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LECTURES ON LEGAL HISTORY

AND

MISCELLANEOUS LEGAL ESSAYS

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LECTURES
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AND

MISCELLANEOUS LEGAL ESSAYS

By JAMES BARR AMES

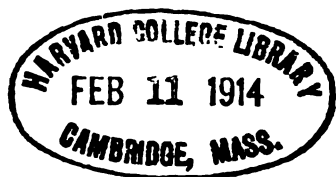
WITH A MEMOIR

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PREFACE

THE following pages contain all the important writings of James Barr Ames, with the exception of two articles on the Negotiable Instruments Act, which have been separately published.

In the year 1886-87 Professor Ames offered in the Harvard Law School a course of about sixteen lectures, which he entitled "Points in Legal History." This course was repeated later, in the years 1889-90 and 1894-95. Several of the lectures were subsequently published in the "Harvard Law Review," and one or two in the "Green Bag," but about a third of the matter of the lectures has never been published. These lectures are given herein substantially as they were delivered, having been prepared for publication from the following sources:

1. Professor Ames's own notes, which were full and accurate.
2. Shorthand notes taken by Professor Samuel Williston, of Cambridge, in 1886-87.
3. Notes taken in 1886-87 by Judge Julian W. Mack, of Chicago.
4. Notes taken in 1889-90 by Professor Ezra R. Thayer, of Cambridge.
5. Notes taken in 1894-95 by Professor Harry S. Richards, of Madison.
6. Notes taken in 1886-87 and corrected in 1894-95 by Professor Joseph H. Beale, of Cambridge.

Several of the published lectures were reprinted in "Select Essays in Anglo-American Legal History," published in 1909 by Little, Brown, & Co., Boston, with additions to the notes made by Professor Ames. These additions have here been reprinted with the permission of the publishers.

Several passages from his unpublished lectures were incorporated by Professor Ames in some of his published lectures. In some such

cases each passage has been printed in substance twice ; once where it originally occurred, and again where it was inserted by the author. It is believed that the advantages of clearness and of leaving the published lectures unchanged outweigh the disadvantage of repetition. For a similar reason several passages from the unpublished lectures have been left in the first person, though the author seldom used that construction in his published work.

The Miscellaneous Essays were nearly all printed in periodicals : the "Harvard Law Review," the "Columbia Law Review," the "Yale Law Journal," and the "University of Pennsylvania Law Review." They are here reprinted by permission of these magazines. A number of corrections made by Professor Ames in his own copies of the magazines have been included. The memoir of Christopher Columbus Langdell, which included the substance of articles in the "Harvard Law Review" and the "Harvard Graduates' Magazine," was published in the work entitled "Great American Lawyers," published by the John C. Winston Co., of Philadelphia, and is here reprinted by permission of the publishers.

The Memoir has been made up from a number of articles published at the time of Professor Ames's death. Permission of the "Harvard Graduates' Magazine," the "Harvard Law Review," the "Columbia Law Review," the "University of Pennsylvania Law Review," and the "Illinois Law Review," has been obtained for the use herein made of the original articles.

JANUARY, 1913.

CONTENTS.

	PAGE
PREFACE	V
MEMOIR OF JAMES BARR AMES	3
 POINTS IN LEGAL HISTORY:	
The Principal Sources Consulted	29
I. The Salic and Anglo-Saxon Courts	34
✓ II. Substantive Law before the Time of Bracton.	39
III. Appeals	47
✓ IV. Trespass de Bonis Asportatis.	56
✓ V. Replevin	64
✓ VI. Detinue	71
VII. Trover	80
✓ VIII. Debt	88
✓ IX. Covenant	97
X. Specialty Contracts and Equitable Defenses	104
XI. Account	116
XII. Simple Contracts prior to Assumpsit	122
XIII. Express Assumpsit	129
XIV. Implied Assumpsit	149
XV. Assumpsit for Use and Occupation	167
XVI. The Disseisin of Chattels	172
XVII. The Nature of Ownership	192
XVIII. The Inalienability of Choses in Action	210
XIX. Injuries to Realty	219
XX. The Origin of Uses	233
XXI. The Origin of Trusts	243
XXII. Specific Performance of Contracts	248
 MISCELLANEOUS LEGAL ESSAYS:	
Purchase for Value without Notice	253
The Doctrine of Price v. Neal	270
The Failure of the "Tilden Trust"	285
Novation	298

	PAGE
Can a Murderer acquire Title by his Crime, &c.	310
Two Theories of Consideration	323
The Vocation of the Law Professor	354 ✓
Mutuality in Specific Performance	370
Specific Performance for and against Strangers, &c.	381
Forged Transfers of Stock	393
How far an Act may be a Tort because of the wrongful Motive, &c.	399
Following misappropriated Property into its Product	412
Constructive Trusts based upon the Breach of an express oral Trust of Land	425
✓ Law and Morals	435 ✓
Undisclosed Principal — His Rights and Liabilities	453
James Bradley Thayer	464
Christopher Columbus Langdell	467 ✓
TABLE OF CASES	485
TABLE OF OTHER AUTHORITIES CITED	513
INDEX	539

MEMOIR.

MEMOIR OF JAMES BARR AMES.¹

I.

JAMES BARR AMES was born in Boston, June 22, 1846. He was the son of Samuel Tarbell and Mary Hartwell (Barr) Ames. His grandfather, Jonathan Ames, was a farmer in Pepperell, Mass., whose ancestor, Robert, came to this country about 1650. His maternal grandfather, James Barr, M.D. (Harvard, 1817), son of James Barr who came from Scotland to New Hampshire in 1774, was a physician in New Ipswich N. H. The grandfather married Laura L. Bellows, great-granddaughter of Col. Benjamin Bellows, the founder of Walpole, N. H. In 1847 Ames's father removed to Medford. There from 1850 to 1854 Ames attended a private school, and then for two years was in the local Grammar School. In 1856 the family returned to Boston, where Ames attended the Brimmer School till the autumn of 1858, when he entered the Boston Public Latin School. In the summer of 1863 he passed the examinations for Harvard College, but his health failing at the end of the first term of his Sophomore year in the Class of 1867, he obtained leave of absence for a year, the greater part of which he passed on a farm at New Ipswich. In March, 1866, he returned to Harvard and joined the Class of 1868. At Harvard he was awarded a second prize of the

¹ This memoir is in the main made up of extracts from the following:

Articles by Charles W. Eliot, Joseph H. Beale, Samuel Williston, and Julian W. Mack in the *Harvard Law Review* for March, 1910.

An article by Joseph H. Beale in the *Harvard Graduates' Magazine* for March, 1910.

An article by George W. Kirchwey in the *Columbia Law Review* for March, 1910.

A memoir by Charles S. Rackemann in Vol. XIII of the *Publications of the Colonial Society of Massachusetts*.

A sketch by Edward H. Warren in the *Boston Transcript*, January 15, 1910.

A sketch by A. D. Chandler, Esq., in the *Harvard Graduates' Magazine* for March, 1910.

A signed editorial by John H. Wigmore in the *Illinois Law Review* for February, 1910.

An article by William Draper Lewis in the *University of Pennsylvania Law Review* for February, 1910.

Boylston prizes for Declamation, July 18, 1867; was given a Detur in his Sophomore year, when connected with the Class of 1867; was assigned a Latin dissertation — "*Num declamandi consuetudo his temporibus sit accommodata*" — for the Exhibition, May 5, 1868; and a Dissertation for Commencement, July 15, 1868, the subject being, "The Reform of the United States Civil Service." He was the Class Orator at the Class Day exercises, June 19, 1868. In athletics he played on the Harvard Nine in nearly all the University baseball matches. He was a member of the Institute of 1770, its secretary and treasurer; the Hasty Pudding Club, its president and Kr.; the Natural History Society; the Delta Kappa Epsilon Society; the Alpha Delta Phi Society; and the Phi Beta Kappa Society. The year after graduation he was an assistant instructor in E. S. Dixwell's School, in Boston; he then went to Europe for travel, and for study at the German universities, from July 1, 1869, to September 1, 1870.

In 1870, on his return from Europe, he entered the Harvard Law School. It was an interesting and a critical moment in the history of that school. A young New York lawyer, Christopher C. Langdell, had just been made Dean, a regular course of study and examination for the degree had just been introduced, and Part I of the first case-book, "Langdell's Cases on Contracts," was presented to the students. The use of this book was a touchstone of intellectual ability. To the great majority of the class it was mere folly; they wished to learn the law as the older professors in the school had settled it to be, and they felt sure that no way was easier, quicker, or surer than that of listening while these professors told them. Langdell's courses were soon practically deserted by all except a few devoted admirers, whose distinguished career at the bar and on the bench has justified their choice. The most devoted of all, and the one whose devotion was most effective in securing the success of the new method, was Ames. He was an indefatigable worker in the school, as throughout his life. He studied faithfully not only Langdell's courses but those of the other teachers as well. He was active and earnest in the work of his law club. He was at the same time an instructor in modern languages in Harvard College, and gave a considerable part of his time to teaching; six hours a week in the last months of his first year, and twelve hours a week in his second. He stayed in the school for a graduate year, and at the

same time taught in the college two courses in history, — a history of England in the seventeenth century and a history of medieval institutions.

During this first year of graduate study he was made Assistant Professor of Law, having proved his quality as a teacher by his years of service in Harvard College. His appointment as Assistant Professor was a remarkable step for the Law School and the University to take. Up to that time the University had never appointed as teacher of law a man who had not been in practice. His appointment was strongly urged by Dean Langdell on the ground that Ames had a remarkable legal mind, and was an extraordinarily successful teacher; and the Corporation and Overseers decided to take the risk for five years on Professor Langdell's and the President's testimony. The consent of the Board of Overseers could not have been obtained, if an assistant professorship had not been an office terminable in five years. Of this appointment President Eliot in his next annual report said:

"The gentleman who is to bear the brunt of this new experiment in the constitution of a Law Faculty has some unusual qualifications for the place, for he is not only distinguished as a student, both in College and in the Law School, but he has had more than two years experience as a teacher in the College; the experiment will therefore be tried under favorable conditions."

It soon appeared that Ames's mental gifts made him a remarkably successful teacher under the case method, which was then beginning to demonstrate its power of training young men for the best work in the legal profession. So striking was Ames's success in making the students think for themselves, and get a mastery of the new method, that he was promoted to be full professor one year before the end of his five years' term as assistant professor, with the cordial approval of students, professors, and governing boards.

This first appointment was made in 1877 at a time when no endowed and named professorship was vacant. Two years later he was transferred to the Bussey professorship, and in 1903 he became Dane Professor of Law, thus arriving finally at a famous professorship which had been held in succession by Joseph Story, Simon Greenleaf, Theophilus Parsons, and Christopher Columbus Langdell. Among the professors of Harvard University there is a distinct preference for an endowed and named professorship, for the reason that

an endowed and named professorship connects the new incumbent with the series of eminent men who have already held it. To succeed Professor Langdell in the Dane professorship was a distinct pleasure and satisfaction to Ames.

On the retirement of Professor Langdell from the deanship in 1895, Ames was made Dean of the Law School, and thereupon became in every sense the leader and head of the School.

His perfect adaptation to his great work came gradually. In the first ten years of his teaching he was merely the youngest in a faculty of esteemed teachers. His readiness to see and talk to the students was just beginning to make him their first friend when the founding of the Harvard Law Review gave him a new outlet for his influence. When the projectors of the magazine went to the faculty with their plan they found differing degrees of warmth in the support offered; but Ames approved without reserve, wrote the first leading article, and became the chief adviser and helper of the editors throughout his life. This brought him into the friendly and intimate personal relation with the editors which was one of the greatest pleasures of his life. When he became Dean his personal intimacy with the student body rapidly grew. Whatever his administration as Dean may mean to the bar of the country and to legal education, there is no doubt that to Harvard it meant the coming of a fine personal influence into the life of the students.

His utter devotion to the teaching of law meant that law and the Law School were never out of his thoughts. He himself thought that he had long seasons of rest; not physical rest, certainly, for in summer on his farm at Castine no hired hand worked harder about the daily tasks of the farmer. He loved strenuous physical work as he loved to wrestle with a legal problem or to help a student. But this manner of life did not mean mental rest, for it was not inconsistent with constant thought and pondering on intellectual problems. Truly, as he said, his was an unusually full life, and he had been able to accomplish more than most men; and so for forty years without intermission he devoted himself to the law and the Law School.

After the school year was well under way, in November, 1909, he found himself unable to apply his mind to his work, and this was soon followed by aphasia. The physicians he consulted gave him no hope of immediate improvement. Accordingly, at the weekly luncheon of the law faculty, just as the lunch was finishing, he leaned


forward in his chair and said quietly, "I am very sorry to say that I must leave the Law School. It may be only a short time, till June or next year, or I may not be able to come back at all. I have been examined by three physicians, and none of them can tell me what is the matter with me. I find I can't remember names. I can't recall the name of any one of you here without extraordinary effort. It has taken me three hours to prepare a lecture that I've usually prepared in half an hour. I must go away at once. Now I don't want any of you to be unhappy about this. I am not at all unhappy myself. If this is the end, I have not a word of complaint; I shall have had long years of service, and far more in my life than most men ever have. I must leave you to make provision for the school."

And so, without a murmur, out of the school he had done so much to make, and out of the lives of his associates, passed one of the greatest scholars and best-beloved men of his time.

He went at once to a sanitorium in Wilton, N. H., and there died on the 8th of January, 1910. His death was a great shock to students as well as to his fellow-teachers. The students, to show him honor, marched in a body to the chapel for the funeral services.

Ames was made a Doctor of Laws by the University of the City of New York and University of Wisconsin in 1898, University of Pennsylvania in 1899, Northwestern University in 1903, Williams College and Harvard in 1904, and the University of Cincinnati in 1908. He was chairman of the section of Legal Education of the American Bar Association in 1904; a leading member of the National Commission on Uniformity of Legislation; a correspondent and friend of the great English scholars in law, and of all the leading American teachers. He lived to see his own pupils deans of ten of the leading law schools, and teachers in almost all of them; and every pupil carried into his teaching not only the methods but the ideas of his master. In this way the bar of every state is feeling directly the influence of his thought and study.

He attended the First Parish (Unitarian) Church, Cambridge. He was a member of the American Academy of Arts and Sciences; of the Colonial Society of Massachusetts; vice-president of the St. Botolph Club, of Boston; a life member of the Harvard Union; president of the Colonial Club, Cambridge, the Old Cambridge Shakespeare Society, and the Cambridge Social Dramatic Club.



He married June 29, 1880, Miss Sarah Russell, daughter of George Robert and Sarah (Shaw) Russell, of Boston. He left two children, Robert Russell Ames and Richard Ames.

President Eliot has said that Ames's life was a happy and fortunate one; for he had domestic happiness, much pleasure in bodily exercise and out-of-door life, long years of devoted service to an institution and a cause he loved, and heartfelt satisfaction in a career which mounted in interest and value as life went on, and was best at its close.

II.

The forty years of his connection with the Harvard Law School was its golden age: the period which President Eliot and Langdell inaugurated but no one did more than Ames to crown with success. He was a member of Langdell's first class and his devoted disciple; and he even more than Langdell himself established the so-called "Langdell method" of studying and teaching law. With Langdell the use of cases in instruction meant the careful and painstaking tracing of a doctrine through the line of authorities by which it was established and developed; his primary position was that the only scholarly way to learn the law of a subject was to read all the decided cases bearing upon it — an easier thing to do in 1870 than at the present time. Ames used a case or a series of cases chiefly to form the basis of a Socratic discussion which should draw out the legal principle involved. It is a curious fact that Langdell, who was a great logician, taught a doctrine through its historical development; Ames, a great legal historian, sought to teach the law chiefly as a philosophical system. Ames's way was far better adapted to the needs of the student, and by the use of it he succeeded in building up in his pupils "the legal mind." Ames gave the system its success as a method of teaching. Doubtless good teachers of law have always been in the habit of putting supposititious cases to their classes. By combining this practice with the use of decisions selected quite as much for the adaptability of their facts to the purposes of discussion as to their authoritative force as precedents (though the latter element was not wholly disregarded), and by a skill hardly surpassed by Socrates in inducing his pupils to answer by their own reasoning the problems which the cases suggested, Ames developed a remarkably flexible and effective mode of teaching from cases.

That his teaching has been in the main the model for his younger colleagues and for the many graduates of the Harvard Law School now following his profession in other law schools is certain. Langdell is entitled to the great honor of a discoverer; but Ames put the discovery to practical use. No one was clearer in the recognition of that fact than Langdell, whose own teaching power was diminished by his very defective eyesight and a certain constitutional slowness in making a careful statement.

Ames was born a teacher; and no one who has ever been connected with the school, as his colleague Professor Gray has said, had so happy a faculty of making the students think for themselves. He loved to teach, and he was a masterly teacher. He would bring out an idea, and the idea would seem entirely reasonable. He would bring out another idea, and that, too, would seem entirely reasonable. Gradually it would dawn on the student that the two ideas were quite inconsistent, and that he must decide which was right. The student was interested, stimulated, tantalized. The lectures by the dean, especially in the course on Trusts, caused great mental disturbance, not to say anguish. He baptized men in brain fire. He was the ideal teacher, courteous and patient. If he led the student to the brink of a precipice, he did not let him fall over: he never failed to indicate the path back to safety. Modestly, in all discussions, he placed the student on his own level; both, apparently, were groping in the wilderness for the truth; and while he would give possible clues, he was ever ready to discuss the student's suggestions and to follow them until it became apparent to the whole class that they led only to confusion. Then, through further questioning, he gradually disclosed the true path to the light. And if, at times, one or the other man wandered away from his leading and opened up new roads to the goal, his acknowledgment was as quick as it was hearty. He aimed not so much to impart information, as to develop the analytical powers of the men, to make them think as lawyers. He questioned much; he answered little. Those who came to hear the law laid down went away to ponder what it ought to be. He loved the battle of wits; but he never argued simply for the sake of victory. He helped men in many ways, but most of all because he made them help themselves. It is a great deal easier for a teacher to state his own views to students than to get them to think for themselves. His views of the law were very positive, but

he always kept them in the background until he had got the students to exercise their own minds on the problems.

To many of his pupils, said his pupil and colleague, Professor Williston, it seems that he was a teacher great almost beyond comparison with any other. Many things combined to give him such pre-eminence. In the first place he was a very learned man. During all his life, after he first took up the study of the law, he was an assiduous reader of the decisions of the courts; and a retentive memory enabled him to preserve in his mind the results of this reading, and often to recall the volume where the case he wished was to be found. He was omnivorous in his reading of law reports. When he was a young man he made a practice of taking the Year Books to his summer home and literally went through them, making the notes which afterwards he partially elaborated in the essays on legal history which distinguished the early volumes of the Harvard Law Review. None the less assiduously he went through each part of the National Reporter System as it appeared, taking notes of all decisions which interested him. But a display of erudition was by no means a prominent feature of his work in the class-room. His great store of knowledge of legal principles in all departments of the law was freely drawn upon, as was his intimate acquaintance with the historical development of the doctrines which were under consideration; but he rarely went into detailed consideration of authorities. It has been said by one of the older graduates of the school that it was the independence and courage which this method manifested in the teacher and fostered in his pupils, which helped to make the training of the Harvard Law School unique among the schools of the country and the world.

As other law schools wished to adopt his method, Ames gladly helped to make its introduction easy. Harvard has never made any attempt to guard the case system as a trade secret; it has, on the contrary, with both hands, done its utmost to help other institutions to adopt it. Ames was foremost in this. He put himself at the service of every law teacher in the country who wanted light and leading. It is not too much to say that to-day, considering the country as a whole, the case system is the dominant method used in teaching law. No one — not excepting Langdell himself — has contributed more to this result than Ames. His influence has been national.

No greater tribute to his power and success as a teacher could be given than that of Professor Kirchwey of Columbia University, who knew him only as a friend and fellow-teacher in later life.

"A power of lucid statement was as characteristic of him as the penetration of his thought and the relentless consistency of his reasoning. But Ames's medium was not literature, but life. He was preëminently a teacher; one might almost say he was a teacher and nothing else. There are many who will deplore this exclusive devotion of one so gifted to the work of instruction. Who that, having been lost in the tangled wilderness of precedents, has been set in the right way by the unerring hand of the author of the *Disseisin of Chattels*, and of the *History of Trover*, can fail to regret that the trails blazed by him are so few; but let us pause before we venture to criticize his choice. Perhaps it is rather a matter for congratulation that Ames never fell a victim to the academic superstition that the true and only end of scholarship is the production of printed matter. His scattered writings, which, if collected, would make but a single volume of moderate size, were only the by-product of his real work, chips from his workshop. His workshop was the class-room and his real work the forming of the minds that committed themselves to his influence, and all of his scholarly investigation and research was only preparation for this high and serious task. Into this he threw his great powers and in this he found the complete reward of his labors.

"It is by no fortuitous chain of circumstances that so many of his pupils have become instructors in law schools. By his spirit and high example he magnified the office of the law teacher and exhibited it as a career worthy of the highest talents and the most exalted aspiration for public service. He realized, as few of the guild had done, what a social force may lie in sound legal instruction. Maitland's maxim, 'Law schools make tough law,' became in his hands a principle of action. He was not content to have the school with which he was so long connected a nursery in which to breed practitioners and train them to their highest efficiency; he would have it a seat of legal influence, a force in the amelioration and amendment of the law. And so it came to pass that his social conscience, his lofty conception of personal obligation, his legal ideals have become a part of the living creed of hundreds of strong men who have gone out from his instruction to become members and leaders of the bar, judges, and

teachers of law in all parts of the land. To few men who work for the future is it given to see the fruition of their labors in their own day. Thrice fortunate, he lived to see the principles worked out in his studies, the legal doctrines expounded to a generation of law students, beginning to shape the course of legal development and to take root in the law of the land. Well might he have retorted to those who would have turned his powers to 'productive work': 'So that I train your lawyers and judges, let who will write your books.'

"And the fact that Professor Ames was marked out by the judgment of the men who came under his instruction as preëminently entitled to that description indicates that he never allowed his reverence for the doctrine that had been long established to blind him to the nature of the moral principle that lay behind the doctrine. The truth is that to him law and justice were one and the same thing, and if this mental attitude sometimes led him to lift a legal doctrine to the height of his own morality, it never permitted him to bring down a moral principle to the lower level of a legal doctrine however venerable, however deeply intrenched. His intellectual and moral integrity were of the same grain. Much has been said and well said by those who came under his instruction of Professor Ames's method of teaching law. Here an outsider must walk warily. But it may be suggested that too much may easily be made of the apparatus employed and too little of the man who employs it. The system of instruction by the study and discussion of cases has, indeed, justified itself in manifold ways, but it did not make Ames the great teacher that he was. Here, as in every other activity of our lives, 'the style is the man,' and Ames's teaching derived its effectiveness from the qualities of mind and character that he brought to bear upon his work. If it be remembered that the teaching of the law was a passion with him, that he came into the class-room with all his powers of reasoning and exposition at their best and with a well-nigh perfect knowledge of the authorities bearing on the subject in hand, we shall not need to inquire too curiously as to the particular methods or devices employed by him to make his instruction effective.

"But Ames's influence was not exerted only in and through the great school which is the chief monument of his devoted services. His see was the entire field of legal education. He labored zealously by wise counsel and helpful sympathy to raise the standard of pro-

fessional training everywhere, and his influence was felt in every center of legal instruction from the Atlantic to the Pacific. Leland Stanford owes him a debt of gratitude for disinterested service, and Columbia offers him her tribute of grateful appreciation for the high inspiration of his counsel and example."

III.

Ames's work as head of the Harvard Law School and friend of the students was the real expression of his genius. During the years of his leadership the standards of scholarship required for admission to the school and for securing its degree were continuously made more severe. His faith that excellence would always win recognition was unquestioning and inspiring to others. He never doubted that the more membership in the school meant to a student and the severer the test required for its degree, the more eager good students would be to resort to the school. Accordingly he had no doubt or hesitation in requiring a college degree as a requisite for admission to the school, and he was the least surprised of the Faculty when this requirement was almost immediately followed by a large growth in the numbers of students. The exclusion of all special students who could not comply with the tests required of students in regular standing, and the exclusion from the school of all students who failed to pass examinations in at least four full courses each year, were other rules of far-reaching effect started by him and carried into effect with good results during his administration. A poor but able and ambitious student was better served, he thought, by helping him to meet severe requirements than by excusing him from them.

Beside his constructive work in shaping the policy of the school in such vital matters, Ames's influence was constantly felt both by the Faculty and students of the Law School. He made it his business as well as his pleasure to keep on intimate terms with each of his colleagues, to inform himself of the work and plans of each, and to further them so far as possible. In this way he maintained and developed the *esprit de corps* of the Faculty.

His intercourse with the students was more important. In no institution of learning could the relation between faculty and students be more friendly and natural than in the Harvard Law School to-day; and this is due almost entirely to him. When he became

dean, he deliberately and gladly put away all his plans for study and writing, and devoted his life to the service of his pupils. The task of his life had seemed to be the fashioning and perfecting of the law; it now became the formation of the mind and character of lawyers. He refused to fix office hours, and put all his time at the service of his pupils. He was always accessible to them; and his chief regret in leaving Austin Hall for Langdell Hall, the new building of the school, was the difficulty it put in the way of easy access for the students to the professors. He refused to give up any detail of administration into the hands of a secretary if it would prevent his personally talking to a student concerned. Thus, all questions arising in regard to the construction of rules were generally decided in interviews with him rather than with a minor official. He seldom dictated anything to a stenographer. He personally administered the scholarships offered by the school, and the loan fund (a fund to supply loans to students to be repaid by them after they have established themselves); and he did not even buy a book of blank promissory notes — the bodies of all the notes are written out in his own hand. With infinite tact and patience he instructed stupidity and reasoned with prejudice. His devotion to his pupils meant giving up his future reputation as a great legal author. He never murmured but once, when a bore wasted all the morning which he had hoped to use for some pressing work; and he repented his lament before it was fairly uttered. All students in doubt or difficulty, or pecuniary need, laid their difficulties before him with assurance of sympathy and, if possible, of help; yet he was never weak or careless in giving help. His sympathy was always controlled by justice, and his idea of justice was not simply that each applicant should be treated as well as any other applicant under similar circumstances, but that he should be treated no better than other applicants had been. His position often compelled him to say disagreeable things, and when he felt it his duty to say something which he knew must be unpleasant to the hearer, he never hesitated to say it. He had, however, in a rare degree the faculty of saying such things without causing personal animosity, because it was always evident that his own statements were based on a sense of duty. His hold upon the students was thus made very strong by their absolute confidence in his sympathy and in his sense of justice. In the last years the interruptions were so constant that he could hardly find a minute

between nine o'clock and five for his own work. This was a hardship, for he loved his work, and had much to do. He always looked forward to the time when he had finished just the little case-book he was at work upon, so that he might devote his time to partnership, to trusts, and above all, to legal history; he hoped to write on them, he said, before he set out on the long journey. He promised his colleagues again and again to give up the making of case-books and get down to serious work — after just this one more. But in spite of desire for serious scholarly work, he gave up his time without a murmur, deliberately and understandingly, to his administrative tasks. He chose to be the friend of his pupils rather than the great author he might have been; and to elevate the character of the bar by the example of an upright life filled full of the spirit of equity and love rather than by writings that should illuminate the science of law.

During the earlier years of his teaching he was interested in the Harvard Law School only. Its methods were on the defensive; other schools and the bar generally were opposed to it; and he, like Langdell, preferred to keep out of controversy by merely doing the work of the school and paying no attention to matters outside. But with the beginning of the acceptance of Langdell's method elsewhere his feeling changed. As his pupils began to teach in other schools he became interested in their success; and as he was applied to by schools throughout the country for teachers he began to see that good influences must be prevailing elsewhere, and good work must be doing. He began to attend the meetings of the American Bar Association, and to extend his acquaintance with teachers elsewhere. The broadening of his acquaintance and knowledge of the work of other teachers was good for him. He became more helpful, and his influence was greatly extended. No one could know him without recognizing his genius; and his advice was sought more and more, and his views obtained a wider vogue. Teachers from other schools, greatly to his delight, began to visit the Harvard Law School, to investigate its methods and get the secret of its success. And it was an equal pleasure to him when several of his younger colleagues were invited to visit one and another school in the West and give them there at first hand the real Harvard teaching. In this way in the last years of his life his relation to the law schools throughout the country became very close, his friendship with other teachers warm and lasting, and the scope of his influence greatly extended.

He was particularly interested in the Law Library. Up to the time he became dean the income of the school had been limited, and no expenditure could be made in purchase of books which was not deemed necessary. Langdell had greatly increased the library, both in number of books and in quality, during his deanship, and had wonderfully improved it considering the small funds available for its extension. But while Ames was dean the school increased so rapidly in size that its income was far greater than its expenses. The Faculty supported him in the feeling that the purchase of books and the building-up of a great library was a proper use for funds contributed by law students in return for their tuition. It became his ambition therefore to gather together the greatest law library in the world, to the use of which scholars everywhere should be welcome and provided with every facility for investigation. A systematic effort was accordingly made to build up the library in every direction in which legal scholarship could be interested in its increase. With the help of a librarian whose ability as a collector of books is distinguished, he succeeded during the fifteen years of his incumbency of the office in making a collection of books on English and American law that probably is already unsurpassable, and he also gathered together a remarkable collection of books on foreign law. His work was not complete; the collection of books must always go on; but the position of the School Library as one of the great law libraries of the world has been fixed as a result of his efforts. The first part of a printed catalogue of the books, issued a few months before his death, including in two volumes the author-index of the books on common law, was pushed through by his enthusiasm and determination. Every visitor to the stack of the school is surprised at the extent of the collection, and the whole stands as one of the greatest monuments of his many-sided mind.

IV.

Ames was fitted as are few for original research, endowed with unrivaled power in extracting sound principles from the bewildering maze of decisions, and skilled in the highest degree in generalization. He never practised at the bar, and was a legal philosopher rather than a lawyer. In some ways this marred his efficiency, but in other

ways it increased it. He took broad views which could be taken only from heights to which few, if any, practitioners could ever rise. He viewed the law as a whole, and he searched for the great principles that underlay it. In constructive legal imagination he has probably never been equalled by any person learned in the common law. One of his youngest colleagues said that he had "the most suggestive mind with which I have ever come in contact."

He loved to evolve and apply a legal principle. Once satisfied that a certain principle was sound, he would look for applications of it in all branches of the law, and his enthusiasm would lead him to believe that judges had acted on the principle in deciding certain cases where (in all probability) the judges had been profoundly unconscious of any such principle. This tendency grew on him in later years. But it was hardly to be expected that a mind could be so original and constructive without this fault. He did not state the authorities — he illuminated them.

His oftentimes novel theories, especially in the law of trusts, are gradually gaining recognition in the courts. No other man has so influenced the development of the law of *quasi*-contracts in this country, both directly and through his students and colleagues. These subjects engaged him, because they, more than any others, gave larger scope for his insistence on the ethical aspects of the law and better opportunity to make legal principles produce just results.

His ~~direct~~ influence on legislation began with the searching criticism to which he subjected the Uniform Negotiable Instrument Act in a series of articles published in the Harvard Law Review. Unfortunately they came too late to effect much needed changes in its provisions. But even though his influence was but slight in respect to this legislation, it was profound on the further work of the Commission on Uniformity of Legislation. He not only participated therein as Commissioner from Massachusetts, but either personally or through his disciples, who have drafted all of the subsequent acts, he has had a predominating influence in shaping both the form and the content of this work, destined to be the foundation of the commercial law of the United States.

Ames was a great scholar, but not because of his unusual brilliancy of mind, nor because of any dogged absorption of knowledge for knowledge's sake. His profound wisdom was a consequence and an expression of his own character. He was honest,

patient, forceful, true; he hated deceit and sham; he loved justice and uprightness; he was severer in his judgment of himself than of others. If he lived the intellectual life, he must be sound and thorough. He became one of the most original and daring of scholars in the analysis of law and in the statement of its principles, but it was not because he jumped at attractive conclusions or generalized from insufficient premises. He came to the study of law a well-equipped student of history; and he turned a trained mind to the ancient sources of our law. By the most patient study of the medieval books he mastered its history; and so sympathetically that he not only knew about the ancient law, he thought the thoughts of the fourteenth century and divined the course of reasoning that led to the rules then laid down. But it was no mere curiosity about ancient facts that led him to this study. It was his business to know the law of the present; he cared for the law of the past only for the light it threw on that of to-day. He believed that a real and fundamental knowledge of present law could not be gained without a knowledge of the past, and his belief was nobly justified by experience. There were few subjects of the law, and those the merely modern, in which he was not absolutely expert. All his younger colleagues agree that they learned their own special subjects largely from him. Every difficulty, every obscurity, was illuminated by his mastery of general principles. His explanations were convincing; his discoveries brilliant; his analysis conclusive. The history of scholarship cannot show a better example of the value of applied history in present-day affairs. Other lawyers have made the Year Books of the fourteenth century useful for the solution of some particular case: he made them the source of the most practical knowledge of current legal principles.

In originality of conception Ames was fertile at every point with new suggestions. He never took up a chapter of any subject without making some new contribution, serving to support a consistent and just result. Amidst the tangle of variant and opposing decisions presented on such subjects as the enforcement of an assignment of a chose in action, or the creation of a resulting trust on a parol contract to convey land, or the rights of partnership creditors against individual partners, his mind was most at home in the satisfaction of discovering a sound principle which would work out the problem. His theories often represented views which at that time no court had

yet perceived. But if there is any mode in which the legal scholar can be distinctively useful, it is surely this. The "God of Things as They Are" was by no means his favorite legal deity. He was an idealist in law, and his supreme gift as a scholar and a teacher was his constructive legal imagination. He believed it to be the function of the lawyer, and especially of the teacher of law, to weld from the decisions a body of mutually consistent and coherent principles. To his mind there was but one right principle upon a given point, and if decisions failed to recognize it, so much the worse for the decisions. He would never answer in the lecture-room a question as to the law of a particular state, preferring to develop the fundamental principles of his subject as he conceived it, leaving the matter there. That all the results of a mind so fertile in theory should find ultimate acceptance is too much to expect; but that the legal analysis which he led his classes to make on his favorite subjects will be without influence on the law, is also not to be believed. Often his results were as satisfying as they were always brilliant and ingenious.

In order to freshen and widen his knowledge of the law it was Ames's habit from the beginning of his career as a teacher until the end, to change, from time to time, the subjects which he taught. He rarely taught identically the same subjects two consecutive years. He also rarely took up a subject without teaching it at least several years, as he deemed that necessary in order to get a full grasp of its principles. As a result of this habit there were very few courses in the curriculum of the school at the time of his death with which he had not made himself familiar by giving instruction in them; and those few he hoped at some time to investigate. He often said that he meant sometime to teach property, criminal law, and the conflict of laws, in order to complete the round of his studies. But with all his knowledge of legal principle he did not neglect a minute and patient study of the decisions of the present day. For years he examined each number of the National Reporter System as it appeared, and noted every case in which he was interested on a slip of paper. The accumulations of the last year or two of his life filled several drawers of his study desk. This habit of examining decisions gave him a familiarity with current law which lawyers in active practice sometimes fondly believe can better be secured at the bar; he was a master of the actual condition of the authorities. His colleagues frequently remonstrated with him for spending so much time in merely collecting authorities and print-

ing them in notes; but he said that they were on his mind, and he must print them to get rid of them. By these methods he grew in scholarship, and acquired a store of analogy and ability to follow a principle through its widest applications; and what he had himself mastered he taught his younger colleagues as well as his pupils. All of his colleagues could, and did, discuss with him the most knotty problems of their several specialties with certainty of getting aid. It was his singular patience in this discussion and exposition of legal principles with his colleagues that has created at Cambridge what may fairly be claimed to be a school of legal thought as well as a law school. His thoroughness of historical training, his breadth of study, his mastery of modern authority, gave him a readiness in the use of his knowledge. He always had his learning in hand. He could discuss a question fully, and after dropping it take it up again a year or five years later with an immediate and perfect familiarity with the whole question. No difficulty could be raised which he did not think out to the end. He would come into the stack of the school the next day, or the next week, with a solution which he had thought out in bed, or while he was running to luncheon, and the discussion was resumed. In the words of one of his younger colleagues, "He was our teacher as well as our dear friend until the day of his death; he made the stack of Austin Hall a place of delight for us, and it was with bitter regret that we left it for the lonely wastes of Langdell Hall, and the daily colloquies with our master became a tender memory."

His familiarity with the principles and decisions on the various subjects which he taught was increased by the preparation of case-books. Many courses when he first assumed them were not provided with case-books, and he took enthusiastic pleasure in preparing them. Preparation of a case-book by him meant going over substantially all the cases on the subject to which the book was devoted. A few selected decisions he printed for his students to read; the rest he arranged in elaborate annotations to the cases which he printed. In all work of this sort which he did the analysis and arrangement of the subject were of primary importance to him. His mind was thus furnished with an orderly scheme of his subject as well as with the authorities upon it.

Though not a trained civilian he was a good linguist, having taught Latin in a preparatory school and French and German in Harvard

College as a young man. He could, therefore, read easily foreign books on the civil law, and throughout his life it was his habit when puzzled by a question of theoretical jurisprudence to see if light could be obtained from the writings of continental lawyers. It was largely owing to this habit and the benefit which he felt might be derived from it that the library of the Harvard Law School owes its extensive collection of treatises, periodicals, reports, and statutes of the modern civil law.

As has been said, one of his greatest contributions to legal scholarship was his essays in legal history. The way in which these came to be written has been told by one of his most distinguished pupils, one of the founders of the Harvard Law Review, Judge Julian W. Mack:

"The suggestion that the Harvard Law Review be established met at once with the response: 'Let's consult Mr. Ames. If he approves, we'll do it.' The project received his cordial support: the editors, his encouragement and advice. Naturally, the place of honor in the first number was given to his article on 'Purchase for Value,' — the first of a long series of brilliant essays, in which he revealed the results of his researches in the history of the common law and equity and their application to the legal problems of to-day. Through the Review, his influence has extended far beyond the students of Harvard Law School and those who have come within their sphere of work; throughout our country and England his contributions to legal history have stimulated younger scholars and have awakened an interest to plow in this too long neglected field."

His eminence as a scholar won due recognition. For many years before his death he was the unquestioned leader of American legal scholarship, and his reputation was international. He was held in the highest esteem by the leading English scholars, — Professor Dicey, Sir Frederick Pollock, and Maitland, with whom he had many common tastes and interests. Maitland, in his lectures on "Equity and Forms of Action," and Sir Frederick Pollock in his "Contracts," and in the pages of the Law Quarterly Review, expressed the highest appreciation of his writings.

The very great influence which Ames acquired over his students and the members of his own and other faculties who came into personal contact with him, was only in part due to his great learning. He was a man of charming manners and most attractive personality;

at once tender and virile, full of humor and kindness and strength. His voice was soft and well modulated, his smile was winning, and his manners were so modest as to be almost shy, and yet they were dignified without being in the least constrained. But perhaps the chief reason for his extraordinary personal charm was his genuine simplicity. He was always gentle of speech, quiet in manner, attentive to the person who was addressing him, and fully alive to the honorable requirements of the situation. Under all circumstances he was a gentleman, and a man of good will. His courtesy was not a matter of form, for he was most informal and homely in his manners; it came from the heart and was the outgrowth of his kindness of spirit. His gifts though many were not showy, and to make any conscious effort to exhibit them would have been abhorrent to his nature. He was always ready to keep silent when under no duty to speak. If some one else wished to take the foreground, Ames was ready to stand in the background and, if necessary, give a little quiet assistance to the man who was in front; yet no one was long associated with him without recognizing his quality and being inspired by it.

No man ever was less formal. So long as he was sure he was not infringing upon the rights of others, he was oblivious to their comments. He would go at a dog-trot through the streets of Cambridge, or even Boston, without its ever occurring to him that he might be making people stare. He absolutely lacked self-consciousness about unessentials; but no man could be more punctilious with regard to a thing that might hurt the feelings of another. On anything that seemed to him to involve a matter of principle, however, he was firm as adamant; and legal rights appeared to him to involve principle. A neighbor could have the coat off his back if he needed it; but if he stopped up a right of way it was war to the bitter end.

His standards of conduct were the highest, both for himself and for the profession of teaching. No merely intellectual powers could compensate in his judgment for the lack in a teacher of a strong sense of duty and honor. He had an almost over-refined sense of personal honor and integrity, and if he was ever unjust it was toward some one who he thought fell below the sound standard of truth and duty. He now and then judged a man by a very little thing, a chance word or a thoughtless act which seemed to him to indicate a selfish or corrupt heart. But in spite of the sometimes slight ground for his

opinion, he seldom, if ever, erred in his condemnation. He was more apt to be unduly kind to his imperfect fellows. He was very fond of the society of his friends; and he had that rarest of qualities, a genuine interest in the problems of others engaged in work similar to his own.

He had great mental alertness and readiness of mind. No one ever got ahead of him in repartee. In conversation he delighted to lie in wait and pounce with genial wit on the unwary. One anecdote is characteristic of his enjoyment of two points of view. A Yale man who had just finished his final law-school examinations came up to him. "I want to tell you, Mr. Ames, what a lucky fellow I consider myself, to have had the best college and then the best law school in the world." "I am very glad," was the answer, "I feel that same way about myself." "Why," the Yale man exclaimed, "were you from Yale?" "No," said Mr. Ames with a smile, "I was from Harvard."

Ames led the life of a scholar, and his work was largely in the world of books and of abstract ideas. He was a pacifier of disputes, and loved peace so long as it was consistent with righteousness. But those who knew him saw in him that combination of courage with gentleness and self-discipline which in other days and circumstances has given fame on the field of battle, and which marked a spiritual kinship between him and Sir Philip Sidney and the Chevalier Bayard.

But his intellectual modesty, never abating, destined him to remain always better known to his colleagues, friends, and pupils than to the profession at large. He commanded instantly and universally the admiration of those with whom he was thrown. The scholar was respected, the teacher esteemed, but the wise-hearted man was beloved. By the students he was affectionately called "The Good Dean." His genuine interest in their work, his lofty ideals of the true lawyer, his personal charm, won their hearts. They came to him at all times and with all sorts of troubles. He cleared up legal difficulties and calmed financial panics; he stiffened moral fiber, pacified anger, and gave advice upon settlement in life. He filled a great place in the life of his pupils, and they loved him, and took him as a model of the gentleman and the scholar. It was fortunate for the bar of the country that he was a man who could make goodness attractive. Such a forceful, virile character as his every young

man could wish to acquire for himself; yet a conscience as white as Ames's was an ideal which no one hoped to attain. He scorned anything mean or underhand, from unsportsmanlike conduct on the ball-field to chicanery at the bar; and no pupil of his, asking himself what Ames would think of such a trick, could knowingly engage in a crooked scheme. To admire and love Ames was better preparation for a high-minded practice of the profession than the profoundest study of the codes of legal ethics. The American bar is a far better body because he inspired eight thousand lawyers with a little of his high enthusiasm for honor and equity.

He retained his affection for his pupils and his interest in them after their graduation. Few men who have come back to see him can forget the quick-kindling glance of recognition, the firm hand-clasp, and the hearty "Why, how do you do?" He was proud above all of their loyalty to the school, and relied upon it as the final security of its continued prosperity.

His death fell on his school and his former pupils as a numbing blow. To the older students who had grown to know him well, it was a personal grief. To his pupils throughout the world, it brought a sense of loss. From California, from Hawaii, from Switzerland, as well as from Boston and New York and Chicago, they wrote of their love and their sorrow.

"Great as was his work, we already know that he was greater than his work; and we feel, beyond our knowing, that back of the scholar and friend whom we have loved and honored there was a wealth of character and a nobility of nature which could only be dimly apprehended even by those who knew him best. But it is by this token — even more than by his learning and the sweetness and charm of his personality — that we shall know him and shall forever claim him as our own. For it is in this, rather than in any achievement, that we find his real greatness." "He swayed the hearts, as well as the minds of his students. There are thousands of men to-day whose grief is real because Ames is dead." "His amiable disposition and his cordial welcome to the young student have made him the central figure in the minds of those thousands of graduates who at this moment all over the country lament his loss."

"No other man with whom I have come in contact has made such an impression upon me, or awakened in me such a strong admiration and desire to serve. I have often thought that if the days of war were

to come again with men following chosen leaders, Dean Ames is the one under whom I should want to enlist. He was the kind of man one worships and would die for. I have never felt the same about any other man I have ever known." "I doubt if there ever was more genuine sadness over the death of a man by the men very much younger than he than in the case of Dean Ames. The Law School is a very blue place these days, and it will be another year before the students can reconcile themselves to the death of the 'Good Dean.'"

The following resolutions, adopted by the students of the School immediately after his death, show the esteem and love of the students for him:

"Resolved: — That we, the students of the Harvard Law School, express our deep sorrow at the loss of one whom we revered as a teacher and loved as a friend.

"His zealous and open-minded search for the real truths of law commanded our admiration; his earnest effort to attain justice and equity without sacrifice of logical precision won our respect; his own tireless energy and his warm personal interest in our labors and difficulties were and will continue to be our inspiration."

All through his life he was possessed of great bodily vigor. The captain of his baseball team in college, he retained his interest in athletics to the last. His services as chairman of the Athletic Committee are well known to all Harvard men. He was a little out of sympathy with what he regarded as excesses of modern college athletics, but he still enjoyed a good game. His special delight was in farming. He had spent a year of ill health while in college on a New Hampshire farm, working hard with the other hands, and in the course of a year fully reestablished his health. He spent every summer in farming, first at York and later at Castine. There he lived a delightfully free life, working in the hay-field or chopping in the woods all day, and only breaking the long hours at noon by a vigorous swim in his mill-pond; but devoting his evenings and rainy days to the study of law, and particularly of legal history. Until his duties in connection with the meetings of the American Bar Association called him away, he spent the whole of every summer in this delightful refreshment. All his life he kept his body in sound condition by physical exercise. He seldom walked. He ran regularly across the field between the school and his house, and even through

Cambridge and Boston. When remonstrated with for his hard and steady work and warned that he would have to take a rest, his answer was an offer to run a two-mile race with the remonstrant, and he would doubtless have won it.

His skill in business affairs was not inconsiderable. When he printed his first case-book he never expected any return from it, and at first he was out of pocket. His "Bills and Notes" did not pay for itself for several years. But with the spread of the case system to other law schools and with the increase in numbers at Cambridge the sales grew enormously, and his income from the sales of his books doubtless exceeded the amount of his salary for many years before his death. He invested wisely, and was not a poor man when he died. But a large part of his income was not invested for himself. He was one of the most charitable men alive. He gave to everything he thought good. He was liberal in his contributions to his church, to his charities, and to all objects of civic improvement. To the Law School he was one of the greatest benefactors. He contributed money regularly for the purchase of expensive books for the library, which he did not feel quite justified in buying with the funds of the school. But the poorer students knew most about his generosity. The loan fund, while he administered it, was never empty to a worthy applicant; and it is larger by many thousand dollars by reason of his anonymous contributions.

He was unalterably opposed to anything like show or display, and refused to advertise the school in any way. When Langdell Hall was opened, and the faculty voted to celebrate the occasion by an oration, he acquiesced and invited an orator; but he was immensely relieved when the orator was unable to come. This quality was an aspect of his personal modesty. Anything which savored of self-praise was most distasteful. The memory of his life and works will be cherished where he would have it, — in the hearts of his pupils.

POINTS IN LEGAL HISTORY.

THE PRINCIPAL SOURCES CONSULTED.

(See Maitland's account of these sources in the *Political Science Quarterly* for September, 1889.)

I.

RECORDS AND REPORTS OF CASES.

PLACITA ANGLO-NORMANNICA: M. M. Bigelow, 1879. A collection of all recorded litigations from 1066 to 1195, collected from the chronicles.

ROTULI CURIE REGIS, 1195-1199 (Record Commission); Vol. I., *tempore* Richard I.; Vol. II., *tempore* John: edited by Palgrave. The extant rolls of the reigns of Richard I. and John. These rolls are not reports of judicial proceedings, like our modern reports, but contain the official record of litigation in the King's Court, made out of court and enrolled. They contain a statement of the dispute, the proceedings, and the judgment, with a brief statement of the reasons for the judgment. The series of these rolls (called the *plea rolls*) runs from the time of Richard I., and is the earliest continuous series of judicial records in Europe. The number of extant rolls is enormous. The volume of litigation in the middle ages was greater in proportion than at present.

ABBREVIATIO PLACITORUM, 1194 to 1327 (Record Commission).

This was a collection of rolls made in the reign of Elizabeth by a lawyer of that period, who took from the old rolls the part most useful to him. The collection is to a large extent fragmentary. The rolls were taken mostly from the King's Court; there are a few assize rolls, and some rolls of *Nisi Prius* trials in London.

BRACTON'S NOTE BOOK, 1218 to 1240, 3 vols; ed. Maitland. A selection of rolls from the reign of Henry III., called Bracton's Note Book, because they appear to be rolls selected by Bracton and used by him in compiling his treatise. Almost all of the rolls furnish legal information. This book was doubtless afterward used by Fitzherbert, but disappeared and was not found again

till 1824. Until Professor Vinogradoff recently found out what it was its value was unknown.

PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER, 1225; ed. Maitland. The complete criminal rolls of a term of the eyre held in Gloucester.

SELDEN SOCIETY PUBLICATIONS:

Vol. I. Select Pleas of the Crown, 1200 to 1225.

Vol. II. Select Pleas in Manorial Courts, *tempore* Henry III. and Edward I.

Vol. III. Select Civil Pleas.

Vol. IV. Select Pleas in Courts Baron.

Vol. V. Leet Courts of the City of Norwich.

These publications show the broad field of the rolls. Every kind of court had its series of rolls.

YEAR BOOKS. These are records of a different kind, being reports of proceedings in court. The reporter, who is in court, takes notes of all valuable things said or done in the court. We have the oral argument of the parties and the observations of the judges, rather than set decisions of the court. The proceedings show the process of arriving at some conclusion as to the presentation of an issue for trial. The reports thus differ from modern reports, which deal simply with the argument and decision of an issue of law.

The Year Books cover the time between Edward I. and Henry VIII., but not in an unbroken series.

- (a) The old Year Books. These were printed in quarto form, a year or more in a volume, at various times and in many editions from 1490 to 1650. They were printed as written, in law French, usually without annotation, and paged by regnal years.
- (b) The folio Year Books. In 1679-1680 Sergeant Maynard published a uniform edition of the year books already printed in folio, with marginal annotations, and with one volume (the first part) printed for the first time from manuscript. This edition consisted of eleven parts, as follows:

Part I. (known as Maynard's Year Book), containing (1) Memoranda in the Exchequer in the time of Edward I. (2) Reports of the years of Edward II. entire.

This part is paged continuously; most of the other parts are paged like the quarto Year Books, by regnal years.

Part II. 1-20 Edward III.

Part III. 21-30 Edward III.

Part IV. 40-50 Edward III.

Part V. Book of Assizes (*Liber Assissarum*), containing reports of proceedings at the Assizes during the entire reign of Edward III.; paged continuously.

Here occurs a break; there are no reports published during the reign of Richard II.

Part VI. Henry IV. and Henry V.

Part VII. 1-20 Henry VI.

Part VIII. 21-39 Henry VI.

Part IX. Edward IV.

Part X. The Long Quinto: a different and very long report of the fifth year of Edward IV.; a shorter report occurs in regular order in Part IX.

Part XI. Edward V., Richard III., Henry VII., Henry VIII.

(c) THE TRANSLATED YEAR BOOKS. The English Rolls Commission is now engaged in printing a critical text and translation of the years which have been omitted from the already printed texts. These books have been edited by Pike and by Horwood. They began with 21 & 22 Ed. I., the earliest year found in manuscript, and have covered all the years found of Edward I. and most of the unprinted years of Edward III.

II.

TEXT BOOKS.

DIALOGUS DE SCACCARIO. 1178-1179. A treatise on the organization of the Exchequer.

GLANVILL'S TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIE: written between 1180 and 1189. It is the oldest treatise on Teutonic law. It is written in Latin, and is confined to proceedings in the King's Court.

BRACTON'S TREATISE ON THE LAWS OF ENGLAND. This was a treatise, written in Latin, on the entire law of England. It is the most important work on medieval law, and the best treatment of the entire body of the common law before the time of Blackstone. It was written in the reign of Henry III. (1256-1259), and rep-

resents the law as administered by the chief judges of that reign. It is a disputed question how much Bracton was influenced by the Civil Law. He founded his statements on decided cases, which he cites exactly in the manner of modern writers on the common law; a widely different method from that of the civil lawyers. The contents of his treatise are as follows:

Book I. Persons.

Book II. Personal property.

Book III. Actions, and criminal law.

Book IV. Various assizes.

Book V. Real actions based on title (writ of right and of warranty).

Bracton's Treatise was first printed in Latin in the sixteenth and seventeenth centuries; it has been reprinted in the Rolls series with a poor English translation.

Bracton was followed by a number of treatises which did not add much to the knowledge of law obtained from his treatise.

FLETA: about 1206; adds a little to Bracton as to the form of administering the law.

BRITTON: a few years later. A little clearer than Bracton in some places. It is the first treatise written in law French. A good edition by Nichols was published in 1869.

HENGHAM MAGNA, HENGHAM MINOR, and the OLD TENURES are special treatises of considerable value.

LITTLETON'S TENURES (time of Edward IV.) with COKE's annotations is the classical work on the feudal land law.

DOCTOR AND STUDENT (time of Henry VIII.), a desultory work.

There were also a number of ancient collections of writs:

(1) Old *Natura Brevium*.

(2) *Registrum Omnium Brevium*.

(3) Fitzherbert's *Natura Brevium*.

MODERN HISTORIES OF THE LAW:

HALE'S HISTORY OF THE COMMON LAW, 1713: incomplete.

REEVE'S HISTORY OF ENGLISH LAW, 1787. A remarkable book, before its time; but so much has been brought to light since then that it is somewhat inadequate. An edition of 1869, by Finlason, is a poor performance; see a review of it by Brunner, 8 Am. L. Rev. 138.

CRABBE'S HISTORY OF ENGLISH LAW: an indifferent work.

POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW to the time of Edward I.

III.

STATUTES.

THORPE'S ANCIENT LAWS AND INSTITUTES OF ENGLAND. Contains all known Anglo-Saxon laws.

STUBBS'S SELECT CHARTERS.

MODERN STATUTES may be consulted in

(1) Statutes of the Realm (Record Commission), Henry VI. to 1800.

(2) Statutes at Large: the more convenient form, from Henry II. to the present time.

IV.

MISCELLANEOUS.

KELHAM'S NORMAN-FRENCH DICTIONARY, a vocabulary of law French.

WRIGHT'S COURT HAND RESTORED helps one understand the contractions in the old books.

THE ABRIDGMENTS, which contain short abstracts of decided points, arranged in alphabetical order of subjects, like a modern digest; they are: Statham's, the earliest; Fitzherbert's; Broke's.

LECTURE I.

THE SALIC AND ANGLO-SAXON COURTS.

THE subject treated in these lectures is the origin and development of the ideas of crime, tort, contract, property, and equity in our law.

The common law is essentially of Teutonic origin, and came from two sources: Anglo-Saxon law and Norman law, Norman law being Frankish. Roman law had little influence on the common law. Some doctrines of Roman law were introduced by Bracton, but fewer than is commonly supposed. Roman law has chiefly influenced the Ecclesiastical Courts and certain doctrines of Equity. Nothing in our law corresponds to the almost complete Romanizing of the law in France, or to the so-called "Reception" of Roman law in Germany. The English law is more German than the law of Germany itself.

The Anglo-Saxon and the Franco-Norman law had much in common; but the Franco-Norman is vastly more important. Where the two came into conflict, after the Norman Conquest, the Saxon yielded; with striking exceptions in the case of city customs, especially those of London. The beginnings of our law are therefore to be sought in the Frankish law, the basis of the Franco-Norman.

The law of the Salic Franks is the oldest of the German folk-laws known to us, being published about the year 475 A. D.

SALIC COURTS. The law was administered, under the Salic law, in popular courts, called Hundred Courts. These courts administered customary law. All the freemen were the judges, and the court was much like a town meeting, and matters were decided by popular vote. There was also the Duke's or King's court, dealing with more important cases; and in this court principles of law prevailed which were in some respects different from the customary law. The issues were determined usually by wager of law, but sometimes by the ordeal.

FRANKISH COURTS. The Frankish courts were the same, but the influence of the royal court was greatly increased. Charlemagne

divided his empire into judicial districts; and *missi dominici*, or commissioners, travelled from district to district, acting as his representatives. The existence of county courts is a mooted question.

NORMAN COURTS. The Norman courts are substantially the same as those of the Frankish Empire, but in the popular courts issues were tried by wager of law and never by ordeal, and in the royal court by wager of battle, and later by jury, an institution of Frankish origin.

ANGLO-SAXON COURTS. The Anglo-Saxon courts were much the same. The ordinary court was the hundred court, which met each month, and the suitors or freemen of the hundred were the judges. There was also a Shire moot or County court held twice a year. It was a popular court, all the suitors being judges, as in the Hundred court. The sheriff presided, but was in no sense the judge of the court. The jurisdiction of the Shire moot was the same as that of the Hundred moot. The plaintiff was not allowed to proceed in the Shire unless he had thrice demanded his right in the Hundred. If, after the Shire moot had fixed a fourth day, the defendant failed to appear, the plaintiff obtained satisfaction in the Shire moot.¹ There was also a royal court, the Witenagemote. The plaintiff was not allowed to apply to this court unless he had tried the Hundred and Shire moot in vain.² The trial was commonly by ordeal or by wager of law.

After the Norman Conquest, the popular courts were, as before, the County Court and the Hundred Court; where the Hundred Court fell within a manor, it became the Court Baron.

The popular courts never were courts of record,³ and the suitors continued to be the judges. Wager of law continued to be the common mode of trial,⁴ though a jury might be allowed by special grant

¹ 1 Stubbs Const. Hist. 135.

² 1 Stubbs Const. Hist. 135.

³ The Court Baron and Hundred Court:

1 Leon. 216, Lord Cobham and Brown's Case (Freeholders, *i. e.*, suitors, are judges in Court Baron); (1819) Holroyd v. Breare, 2 B. & Al. 473; (1846) Brown v. Gill, 2 C. B. 861, 873, and cases cited; (18 Jac.) Armyn v. Appletoft, Cro. Jac. 582; (42 Eliz.) Pill v. Towers, Cro. Eliz. 791, Noy, 20; (28-29 Eliz.) Anon., Godb. 49; s. c. Lovell v. Golston, Godb. 68; (8 Will. III.) Lambert v. Thornton, 1 Ld. Ray. 91; (2 Anne) Tonkin v. Croker, 2 Ld. Ray. 860, 862; (23 Car. II.) Eure v. Wells, T. Jones, 22; (30 Eliz.) Melwich v. Luter, 4 Rep. 26.

The County Court:

(25 Car. II.) Anon., 1 Mod. 170; (1829) Jones v. Jones, 5 M. & W. 523.

⁴ 2 Inst. 143: "Of common right & by course of law all pleas therein (Court

or custom. Indeed these courts maintained these characteristics down to the present century. A popular court had no power to seize and sell property on execution, but must proceed by distraint.¹

The jurisdiction of the Court Baron was confined to cases where the amount claimed was under forty shillings, unless it had a greater

Baron) are determinable by wager of law, and yet by prescription the lord may prescribe to determine them by jury."

The City Law, 77:

"If a freeman within the City be impleaded by way of trespass for goods taken or for battery where no blood is drawn, nor no wound apparent; and for other trespasses supposed to be done against the peace, such a freeman so impleaded may wage and make his law by the usage of the City, that he is not culpable, with seven hands as is aforesaid." (See also *ibid.* 41: "when any defendant in plea of debt or *other action* personal wagheth his law as a freeman," &c.)

Modus tenendi unum Hundredum: Rastell, Law Tracts, 410 G.

"Et nota que *tel* issue poet chascun home prendre en chascun pleynt. Et de *cas aveyse chascun bene qui voel issue prendre pour sa ley* quyl traverse les choses que maynteynt sa accyon come le debet en cas de dette et le detynt en cas de detinue, et linfrindre en cas de covenant, et la prise en pryse des avers.

"Et nota que en ple de trespass, il dira que n'est de ryen coupable, et sur ceo rendra sa ley."

Lib. de Antiq. Legibus, 34: the aldermen and citizens said the Custom of London was "quod cives Londoniarum debent se defendere de morte hominis per 36 homines juratos et per transgressionem versus regem per 12 et versus alium septima manu."

Rast. Law Tracts, 410 B., C.:

"Ore fayt a dire en quat maner poet home prendre issue en courte baron sur les pleynts. Et saches que home poet issue prendre per comen, ley per examenement de suyte, et per aleyement et per conysaunce."

2 Com. Dig. 472, County (C. 11):

"If a suit be in the County Court by *Justices*, the trial shall be by a jury. So by prescription, it may be in a suit by plaint; but, without a prescription for it, in a suit by plaint, the trial shall be by wager of law, or examination of witnesses."

¹ Y. B. 4 Hen. VI. 17, 2. "The opinion of MARTIN, J., and of the whole court was that if one recovers in a court baron, those of the court have no power to make execution to the plaintiff of the defendant's goods, but they may distrain the defendant after judgment and retain the distress in their hands in safe keeping until the defendant has satisfied the plaintiff for that of which he is condemned. *Quod nota. Quers bene* of this matter. *Vide* Lib. Int. fol. 166."

(3 Jac. I.) Trye v. Burgh, Noy, 17:

"Adjudged that a bayly of a court baron upon judgment there given and a *levari facias* awarded, cannot sell the goods, & so levy the moneys, without special custom. See 4 Hen. VI. 17; 38 Ed. III. 3. That he may deliver the goods to the recoverer. That the lord may sell a distress taken for a fine."

(42 Eliz.) Pell v. Towers, Noy, 20. . . . WALMESLEY, J. . . . "You may add anything to a Court Baron by prescription; as to sell goods taken in execution upon a judgment. Affirmed now here, whereas otherwise it hath been held that you could not."

jurisdiction by prescription; in that case it became a court of record.¹

The County Court had jurisdiction of debt, detinue, and other personal actions, not being *vi et armis*, under the value of forty shillings; of replevin, by the Statute of Marlbridge (52 Hen. III. 21); and of trespass; but if the plaintiff affirms the value of forty shillings action is suspended by the Statute of Gloucester.²

There was no jurisdiction in the County Court of a plea *vi et armis*,³ of debt or detinue of forty shillings or above,⁴ of wounds or mayhem,⁵ of deceit or maintenance, or of forging a false deed. Nor was there jurisdiction of account, though under forty shillings; for a sheriff cannot assign auditors, who are judges of record.⁶ The County Court could entertain no action of debt on record or specialty, and no plea by plaint of freehold,⁷ nor a plea of charters for land of freehold or inheritance.

The Royal Courts after the Norman Conquest were: (1) *Curia Regis*; afterwards divided into: King's Bench, principally for criminal cases; Exchequer, for revenue cases; Common Pleas, for ordinary litigation. (2) Justices in Eyre; the Successors of the Frankish *missi*. (3) Courts Leet.

Royal Courts were Courts of Record. The judges were appointed by the King as his representatives. The trial was either by duel or by jury. Although Popular Courts continued, the *Curia Regis*, as was the case with the *Curia Ducis* in Normandy, speedily drew to itself almost all litigation of importance; and as members of the *Curia Regis* were the chief men of state, and therefore Normans, it is easily seen how our law is Norman rather than Anglo-Saxon.

At an early period it was an established rule that the popular courts could entertain no plea of debt, detinue, or damages for injury where the amount claimed equalled forty shillings.⁸ Furthermore, the

¹ Pell v. Towers, Noy, 20; Y. B. 5 Ed. IV. 127 b.

² 2 Com. Dig. 470, 471.

³ 2 Inst. 312; 4 Inst. 266.

⁴ Rast. Law Tracts, 408, 1.

⁵ Rast. Law Tracts, 408, 1; 2 Inst. 312.

⁶ 2 Inst. 380.

⁷ Cannon v. Smalwood, 3 Leon. 203.

⁸ Action in Popular Courts was the same in kind as in the King's Courts; see e. g. an instance of trespass in Hundred Court, 1109-1110, Plac. Ang. Nor. 102, Faritius v. Gamel (Tr. d. b. a.).

insertion of *vi et armis* in a plaint for injury to person or property ousted their jurisdiction.¹

In Glanvill's time, it is true, thefts were within the jurisdiction of the County Court (*quare* as to this), and even in later times some feudal lords had a similar jurisdiction by royal franchise. But thefts were withdrawn from County Courts by Magna Charta (1215), c. 24,² and criminal jurisdiction of lords of the manor soon became exceptional. The King' courts, therefore, will alone be considered hereafter.

¹ 1 Mod. 215, *Wing v. Jackson*.

² Stubbs *Sel. Charters*, 300.

LECTURE II.

SUBSTANTIVE LAW BEFORE THE TIME OF BRACTON.

THE domain of Torts is at once more restricted and more extensive than in modern times. On the one hand, only physical injuries are regarded as torts, *i. e.*, injuries to the person, or meddling with specific property. There is nothing corresponding to wrongs for which in the English law of to-day an action on the case is the appropriate remedy. On the other hand, the law of torts included much that in modern times falls under the head of criminal law. Thus killing, mayhem, robbery, and the like belonged principally to private law.

There was no public prosecutor, and nothing corresponding to an indictment. If the party injured, or, in case of killing, the kinsmen of the deceased, did not seek redress, the wrong went unpunished. If the party injured proceeded against the wrongdoer, the latter, in most cases, escaped with the payment of a pecuniary compensation and a fine, unless he refused to appear, in which case, as in any civil action, he was outlawed. Of this fine the larger part, "*faidus*," went to the plaintiff and the smaller, "*fredus*," to the state.

The pecuniary compensations and fines are set forth with great precision and minuteness in the Salic law. One could tell to a shilling just what it would cost to kill one's neighbor's cow, or even the neighbor himself. If the latter was a free man the compensation was two hundred shillings; if a slave, twenty-five shillings; if a royal official, six hundred shillings. Similarly there was a fixed price for a broken nose or an eye knocked out.

The recovery of stolen property. In one class of cases a plaintiff was permitted to obtain specific reparation instead of damages, namely, in the case of stolen property, *i. e.*, property wrongfully taken. As certain rules in modern English law are directly traceable to the procedure of the Salic law it is worth while to describe it.¹

The object of the procedure was essentially the discovery of the

¹ The procedure is fully described in Sohm, *Der Process d. Lex Salica*; Jobbé-Duval, *La Revendication des Meubles*, an excellent book.

thief; the recovery of the property was incidental. In substance it was as follows: The owner must raise hue and cry and in the company of neighbors make fresh pursuit after the thief. The rights of the parties vary accordingly as the thief is caught with the stolen goods *flagrante delicto*, which in Salic law was within three days, or not. If within three days, the thief is bound, taken to a court specially convened, and if plaintiff and two others swear to the theft and the arrest of the defendant he is condemned without more. The defendant is not allowed to make any defense. The plaintiff recovers his property and a fine for the theft. If in fact the plaintiff has acted wrongfully, he is liable to be sued by the defendant therefor, *i. e.*, as a thief or for homicide.

If the defendant is taken with the goods after three days, he then has the right to be heard. He may repel the charge

(1) By claiming the thing as his own, *e. g.*, by right of production; he with others swears to that fact; and if the oath is sworn with due formalities, the defendant gets the chattel, and the plaintiff is fined for his false claim.

(2) If the defendant claims as bailee of or purchaser from a third person, he is allowed a certain time in which to produce this person, called a warrantor. If he succeeds, the original defendant is not a thief, and the plaintiff must continue his pursuit against the warrantor. If the latter appears, the original defendant delivers the property to him and retires from the litigation, the warrantor taking his place; who in turn may claim as owner or vouch his warrantor, and so on till the original taker is found. If the latter cannot prove ownership, the plaintiff wins and takes the property. If he can prove ownership, as original owner, he is restored to his property.

(3) If the original defendant cannot produce his warrantor he must, though an innocent purchaser, surrender the property; but may by compurgation acquit himself of the fine for theft, upon his oath that he bought it of a third person or took it as bailee.

Contracts were of two kinds, *real* and *formal*: *Real* where the obligation is founded on the receipt of a *res*, as in case of loan, sale, barter, or bailment; *Formal*, where the obligor receives no *res*, *e. g.*, surety. The formality consisted in throwing or handing a *festuca* or straw by obligor to obligee, and any obligation assumed in court seems to have been binding regardless of a *quid pro quo*.

The law in Normandy was in general the same as the Salic law.

Thus in 1008, thieves being pursued gave the stolen animals into the custody of a *bona-fide* acting old man. The pursuers soon came up. "Quod cum fecissent statim deprehensus senex cum bobus, trahitur, caeditur ac reorum more vincitur. Ductusque ad principem civitatis, comitem videlicet Heribertum, vult causam discutere. Non auditur."

The Anglo-Saxon law was also similar to the Salic law.

The Anglo-Norman law was a development from the Norman. Actions for torts in the King's courts after the Norman Conquest were known as appeals, a Norman term. Thus there were appeals of battery,¹ mayhem,² robbery,³ larceny,⁴ arson,⁵ rape,⁶ homicide and murder,⁷ imprisonment,⁸ and sorcery.⁹

In the popular courts slighter injuries were redressed; they were known as trespasses; such were battery (not amounting to mayhem),¹⁰ injury to property, personal or real, and actions for goods carried off.¹¹

In appeal of battery (*i. e.*, wounding), mayhem, and imprisonment, the appellor recovers damages,¹² and in appeal of robbery and larceny for recovery of specific goods he recovers the goods taken.

¹ Bract. f. 144, 2 Tw. Br. 458; Britt. 49; Fleta, Lib. 1, c. 41. There is no appeal when the damage is under 12d., nor for a slight battery which is only a trespass. 1 Nich. Britt. 48 b.

² Bract. f. 145, 2 Tw. Br. 464; Britt. 48 b; Fleta, Lib. 1, c. 40. In 19 Ed., Ab. Pl. 285 (Northum.), the defendant was acquitted, but must answer to the King. The jury will pass on it unless so small that it ought not to be proceeded upon *criminaliter*. In Bro. Abr. App. 25 an appeal of mayhem was dismissed because the injury was not serious enough. The judges pass on the question of mayhem or no mayhem. Y. B. 28 Lib. Ass. pl. 5; Y. B. 6 Hen. VII. 41, 1; Y. B. 21 Hen. VII. 33, 30; Y. B. 21 Hen. VII. 40, 58.

³ Bract. 146, 2 Tw. Br. 474; Britt. 45 b.; Fleta, Lib. 1, c. 39.

⁴ Bract. 150 b, 2 Tw. Br. 508; Britt. 45 b.; Fleta, Lib. 1, c. 38.

⁵ Bract. 146 b., 2 Tw. Br. 478; Fleta, Lib. 1, c. 37.

⁶ Bract. 147, 2 Tw. Br. 480; Case in 1560, Lambe's Case, Dy. 201, pl. 67.

⁷ Bract. 134 b, 2 Tw. Br. 384; 136 b, 2 Tw. Br. 398; 148 b, 2 Tw. Br. 494; Britt. 43 b; Fleta, Lib. 1, c. 30, 31, 35, 36.

⁸ Bract. 145 b, 2 Tw. Br. 470; Britt. 49; Fleta, Lib. 1, c. 42.

⁹ Abb. Pl. 62 Col. 1 Norf.

¹⁰ (1176) Archbishop of York v. Bishop of Ely, Plac. Ang. Norm. 223 (trial by compurgation).

¹¹ (1275) 2 Seld. Soc. 141; Fair of St. Ives. Assault and asportation; wager of law as to assault, and jury as to asportation.

¹² 18 Ed. III., 20, 31: "Note that one was outlawed in an appeal of mayhem and was to have charter of pardon by statute, because this sounds only in trespass: For the party recovered only damages as in trespass, and in favor of the plaintiff was the statute made. And it was touched that in ancient times and still by rigor (?) of law (altho' it is not used) one shall lose in this suit member for member, and so a party de-

In form and substance, therefore, appeals were like the actions for such injuries in the Salic law, except that the Norman wager of battle was the mode of trial in these as in all appeals, instead of wager of law, or the Anglo-Saxon ordeals of hot water and iron. But although there was still no public prosecutor, the appellee who was found guilty of the tort was also punished for the wrong to the state. Whether in appeals of robbery, larceny, arson, rape, and homicide the appellors recovered pecuniary compensation under the Norman kings is not clear. It is probable that these wrongs just mentioned were punished with death from William the Conqueror's time,¹ and it is more than possible that persons so punished forfeited at the same time their goods to the crown. It is obvious that the law must have been unsatisfactory both to the King and individuals injured. The latter would frequently fail to institute appeals, which could profit them nothing beyond the gratification of the desire for vengeance, and exposed them to the risk of wager of battle; and the King would therefore fail to get the goods of wrongdoers, and crime be unpunished. This may explain in a measure the introduction of the public prosecution by indictment. This institution came from the Frankish Empire, and Henry II. introduced it as a remedy for crime.

In the last quarter of the eighth century we find evidence in the Frankish Empire of an official proceeding against wrongdoers. Pepin in 782-787 directed counts to select an indefinite number of respectable men and compel them to swear to give information of homicides, thefts, &c., when known to them.²

By a capitulary of Charles the Bald applicable to Normandy, A. D. 853, a similar duty was upon the *missi*, the forerunners of the justices in eyre. Normans carried the practice to England; but not reduced to a definite form until the reign of Henry II.³ "Legaliores

fendant shall be taken at the first day by his body and cannot make attorney to be at bail; so that this is different from trespass. *Et statuta sunt stricti juris.*"

Kirton v. Williams, Noy, 36 (1595). "Appeal of mayhem being but a trespass without any jeopardy of life."

¹ Laws, Wm. I., 67; Wilkins, 229, 218.

Laws of Hen. I., 1108; Wilk. Ang. Sax. Laws, 304:

"Rex Anglorum Henricus pacem firmam, legemque talem constituit: ut si quis in furto vel latrocinio deprehensus fuisset, suspenderetur; sublata virgildorum, id est, pecuniariae redemptionis lege."

² Brunner, Gesch. d. Schwerger.

³ Assise of Clarendon, sect. 1, 2 (1166); Stubbs, Select Charters, 145:

"Imprimis statuit praedictus rex Henricus de consilio omnium baronum suorum,

homines" were sworn to give information as to disturbances in their neighborhood. The facts were presented by indictment to the justices in eyre; and the presented party was then compelled to purge himself by the ordeal of boiling water.

In substance the institution here described is the same as the later grand jury, and the accusation of the *legaliores homines* was called presentment or indictment. Verdict of a petty jury afterwards took the place of the ordeal.¹

The indictment did not supersede the private action; in fact, publication was not allowed to be brought until the individual failed to prosecute for a year and a day. This was changed by statute; but even then, in case of acquittal on the indictment, the individual could bring the appeal.²

pro pace servanda et justitia tenenda, quod per singulos comitatus inquiratur, et per singulos hundredos, per XII legaliores homines de hundredo, et per IV legaliores homines de qualibet villata, per sacramentum quod illi verum dicent: si in hundredo suo vel villata sua sit aliquis homo qui sit rettatus vel publicatus quod ipse sit robator vel murdrator vel latro vel aliquis qui sit receptor robatorum vel murdratorum vel latronum, postquam dominus rex fuit rex. Et hoc inquirant Justitie coram se, et vicecomites coram se.

"Et qui invenientur per sacramentum predicatorum rettatus vel publicatus quod fuerit robator vel murdrator vel latro vel receptor eorum, postquam dominus rex fuit rex, captaur et eat ad juisam aquae, et juret quod ipse non fuit robator vel murdrator vel latro vel receptor eorum postquam dominus rex fuit rex, de valentia V solidorum quod sciat."

See an instance under this Assise in Northumb., Ass. Rolls, 88 Surtees Soc.

¹ See Staunf. P. C. 107; Armstrong v. Lisle, Kelyng, 93, 95, 96, 97, 98. Staunf. 107 cites 7 Hen. IV. 34, 22; 21 Hen. VI. 32 (death); 31 Hen. VI. 3 (robbery).

² Y. B. 17 Lib. Ass. 1; Y. B. 17 Ed. III. 2, 6. Appeal of death. "Defendant was acquitted of the felony at suit of the King; but all his counsel dared not demur upon this, and yet he had several sergeants there; and the reason was because it was within the year, &c. And afterwards plaintiff was nonsuit."

Release of battery by plaintiff deprives King of his fine: Y. B. 4 Ed. IV. 29, 8.

13 Hen. VI., Fitz. Cor. 278: "One was arraigned on indictment of felony altho' appeal was pending of same felony by infant. Newt."

22 Hen. VI., Fitz. Cor. 279: "One was arraigned at the suit of the King altho' an infant sued appeal against him of the same felony. Sh. took his reason because perhaps he who is indicted will by covin make an infant bring an appeal and thereby suit of the King would be lost."

Y. B. 14 Hen. VII., 10, 20: One wounded may elect trespass or appeal of mayhem, just as disceisee may have assise or writ of right.

Y. B. 41 Lib. Ass. 16: One must elect between appeal of mayhem and trespass; he cannot have both; but in Y. B. 22 Lib. Ass. 82, THORP said that recovery in mayhem is no bar to trespass for the battery. This seems an error.

As to the priority of appeal to indictment, see Y. B. 30 Ed. I. 518, 520. See, however, on point that trespass would not lie until felony disposed of, if one was

But the privilege of priority with appeal was still a hardship upon parties injured, since there was no pecuniary redress; sooner or later this injustice must become intolerable. The injustice was remedied when Bracton wrote. Bracton tells us that persons injured by wounding, mayhem, imprisonment, robbery, and theft had an option to proceed either criminally by appeal, or civilly by trespass, in which the plaintiff recovered damages.¹

When or how this action of trespass came in neither Reeves nor any other writer tells us. An examination of the *Abbreviatio Placitorum* leads me to think that the action must have been first brought in the *Curia Regis* about 1252. Up to that time, from 1194, when the *Abbreviatio Placitorum* begins, I find some twenty-five cases of appeals of different kinds, but no case of trespass.² In the single year 37 Hen. III. (1252-53) I find no fewer than twenty-five cases of trespass, and from this time on the action is frequent, while appeals are rarely brought. The pecuniary advantage to the plaintiff was not the only reason for their preference for trespass. By adopting this action they were relieved from the risk of trial by battle and from the extreme technicality of the procedure in general. Trespass was always tried in *Curia Regis* by a jury.³ Britton⁴ advises the use of trespass instead of appeal.

It is probable that the action was introduced by simply issuing an

indicted for a felony and also for a trespass, Y. B. 7 Hen. IV. 34, 22: This case supposes an indictment for felony and also for trespass and says King may elect who shall be tried first. Markham v. Cobb, Latch, 144; Trespass d. b. a. lies after defendant has had his clergy in indictment. Outlawry in trespass bars appeal and indictments. Y. B. 18 Ed. III. 35, 15. "Note that in appeal it was alleged that plaintiff is outlawed for trespass and therefore defendant went quit without being arraigned at suit of King."

¹ Bract. 145 b, 2 Tw. 472, 150 b, 2 Tw. 510.

² Several cases of trespass in Bract. Note Book, also in 2 Rot. Cur. Reg. 4 (1199), and possibly 2 Rot. Cur. Reg. 51 (1199). See p. 179, n. 3.

See Cronica Maiorum, &c., London, p. 3, &c. (1257). See p. 29.

³ In Glanvill's time appeals were determined only by battle. In Bracton's time appellee had option of battle or jury. In 32 Hen. III. (1248), Pl. Ab. 126, col. 2, rot. 13, appellee put himself on a jury.

See also (1200) 2 Rot. Cur. Reg. 91 and 92; (1200) 2 Rot. Cur. Reg. 103; (1200) 2 Rot. Cur. Reg. 230; (1200) 2 Rot. Cur. Reg. 278, in which cases defendant paid for privilege of jury.

⁴ "Mes pour eschure la perilouse aventure de batayles, meutz vaut fere la sute par nos brefs de trespas qe par apels." Britt. 49.

Statutum Walliae: "Vix in placito transgressionis evadere poterit reus quin defendat se per patriam." From Maitland.

original writ out of Chancery directed to the sheriff and commanding him to attach the defendant to appear in the King's Bench to answer the plaintiff.¹

The count in trespass was identical² with the corresponding appeal except that it concluded with an *ad damnum* clause and omitted the offer of battle and the words *feloniter, felonice, in feloniam*, which were usual but in early times not essential in appeals.

The concession of trespass to parties injured was not so generous as might at first appear. For in the first place plaintiffs had to buy the writ of trespass; and secondly, the unsuccessful defendant had to pay a fine for breaking King's peace.³ So long as this fine was enforced, it is probable that the crown did not afterwards proceed by indictment. Indeed Britton says explicitly, "Mes en cas ou ils ave-
rout sui en fourme de trespass tut eyt nostre pes enfreynte, ne voloms ja sute aver." Of course this did not continue to be the rule in modern times. Indeed there has been a common opinion that a plaintiff could not bring his action of tort until the felon had first been tried criminally. This notion, and not the ruling of the judge criticized by Mr. Justice Stephen, is the result of judicial legislation. It was first suggested in 1606 in *Higgins v. Butcher*,⁴ and repeated in

¹ See Britton, 49 b. "Et primes cum aucun avera purchacé noster bref de trespass sur maheyng ou emprisonnement ou playe, ou sour chose emblé ou robbé ou autrement malement emporté et detenu," &c., "al comencement delivera soen bref al viscounte"; "et le viscounte face destreyndre les trespasours . . . qe ils soient en nostre court . . . a respondre a tels pleyntifs des trespas contenu es brefs," &c.

² See Bigelow, Pl. Ang. Nor. 285, for form of appeal of robbery, and 25 Hen. III. Pl. Ab. 107, col. 1, rot. 6, for appeal of battery. "R. S. appellat R. M. et al. quod . . . venerunt . . . et ipsum [R. S.] nequiter et in feloniam et contra pacem Domini regis insultaverunt, verberaverunt, &c. . . . Et hoc offert disrationare per corpus suum. Et R. M. venit et defendit vim et injuriam et omnes felonias et quicquid est contra pacem Dom. Regis et totum contra praedictum R. S. Et hoc offert defendere per corpus suum."

³ In Y. B. 2 R. III. 14, 39, it was agreed by Tremaille and Brian that appeal of robbery might be brought after trespass d. b. a. and judgment for defendant therein, because appeal is of a higher nature than trespass. Analogy of writ of right after assize.

(1590) *Hudson v. Lee*, 4 Rep. 43 a, 1 Leon. 318. Plaintiff recovered in trespass and then brought appeal of mayhem. Judgment in trespass a bar.

Mirror of Justice, cap. III. sect. 19: "To appeal of robbery or larceny he may say that he makes this appeal wrongfully since this same actor sued the same action against the same person originally in form of trespass before these judges."

In Horne it does not appear whether plaintiff won or lost in trespass.

[⁴ Yelv. 89; Noy, 18. See *Greewel v. Ireland*, Latch, 215. "Without *vi et armis* no fine is due to the King."]]

Markham *v.* Cobb¹ and in Dawkes *v.* Coveneigh,² where a plaintiff was allowed to maintain trespass against a defendant convicted of larceny.³ This modern idea has been much criticized, and it is doubtful if it is still law.⁴

¹ W. Jones, 147 (1626).

² Sty. 346 (1652).

³ See also Cooper *v.* Witham, 1 Sid. 375 (1669).

⁴ Wells *v.* Abrahams, L. R. 7 Q. B. 554; *Ex parte* Ball, 10 Ch. Div. 667; Midland Co. *v.* Smith, 6 Q. B. D. 561; Roope *v.* D'Avigdor, 10 Q. B. D. 412.

LECTURE III.

APPEALS.

WE have considered the courts from the time of the Salic law to the thirteenth century in England. We have seen that the actions for injuries to persons or property were much the same in England after the Norman Conquest as in the country of the Franks and Normans; but that whereas in early times most of the litigation was in the popular courts, that these courts, under the centralizing influence of the Anglo-Norman kings, were resorted to only in the minor causes, the important actions being brought in the Curia Regis. The transfer to the royal court was effected very easily. It was only necessary to add the words *feloniter, vi et armis, contra pacem regis* to the count in the popular court. The action in the royal court in England was called an "Appeal," a term borrowed from Normandy.¹

In the early time of Salic law all the actions for injuries might result in pecuniary satisfaction for the wrong done, or in the restitution of a chattel carried off. Not so of the English appeals. Strictly no pecuniary satisfaction was admissible. Appeals were purely for vengeance, except the case of appeal for larceny or robbery, when the chattel lost or stolen might be recovered. This remained true of the graver wrongs, homicide, murder, rape, arson, and robbery and larceny when the chattel itself could not be got; these were all felonies punishable by death and forfeiture to the crown of the felon's chattels, so that there was necessarily nothing for the appellor who succeeded except the gratification of his vengeance.

In the appeals for smaller injuries, battery, imprisonment, and mayhem the convicted appellee, although technically a felon, was not punished with death, but the *lex talionis* was applied. He must suffer the same injury that he had inflicted upon the appellor: an eye for an eye, a tooth for a tooth.²

¹ By Stat. 6 Ed. I. c. 8, a check of 12d. limitation was placed on the bringing of appeals.

² 1 Nich. Britt. 49 b, in appeal of battery; 1 Nich. Britt. 48 b, appeal of mayhem;

At a comparatively early day the *lex talionis* was abandoned and pecuniary compensation given in these minor appeals;¹ so that appeals may be grouped in three classes: (1) The compensatory appeals, *i. e.*, appeals of battery, mayhem, and imprisonment, in which the appellor recovered damages; (2) the punitive appeals, *i. e.*, appeals of homicide, rape, arson, and also robbery or larceny of chattels worth 12*d.* or more, where the stolen chattels could not be recovered, in which the punishment of the defendant was the sole object;² (3) the recuperatory appeals of robbery or larceny, in which the appellor sought to recover the stolen chattels as well as to discover and punish the thief. All of these appeals have disappeared, having been superseded by indictment or trespass.

The appeal of battery was tried by battle,³ and punishment was according to the *lex talionis*.⁴ An appellor lost his right to insist on trial by battle by his delay and failure to raise the hue and cry; but in that case he might recover in trespass.⁵

In the case of the appeal of mayhem the trial was by jury, not by battle, since the appellor, being maimed, could not give battle;⁶ at an earlier time defense was made by the ordeal of iron.⁷ The punishment was loss of limb for limb, unless the appellor would accept money compensation.⁸

In appeal of imprisonment the appellee was allowed the option of battle or jury; punishment was by the *lex talionis*, *i. e.*, the appellee was imprisoned, and was not released until he made satisfaction in damages to the appellor.⁹

As trespass accomplished the same purpose as the compensatory

Bracton, 2 Tw. Br. 473, and Fleta, Lib. I. c. 42 (false imprisonment), the appellee was not to be released till he had satisfied appellor for damage done.

¹ Y. B. 18 Ed. III. 20, 31.

² "This appeal is not a real or personal action . . . the woman (appellor) is seeking vengeance for the death of her husband." Y. B. 9 Hen. IV. f. 2, pl. 8. The compensatory appeals, in their origin, were likewise actions for vengeance. 1 Nich. Britt. 124; Fleta, Lib. I. cap. 40, 42; Y. B. 18 Ed. III. f. 20, pl. 31; 2 Pollock & Maitland, Hist. Eng. Law, 487.

³ Fleta, 59, Lib. I. c. 41.

⁴ 1 Nich. Britt. 49*b*.

⁵ Northumb. Rolls (Surtees Soc'y), 88. Another case of appeal for battery, Northumb. Rolls, 366.

⁶ Bract. N. B. (1225), No. 1084; Fleta, f. 59; Bract. 145*a* (2 Tw. Br. 467).

⁷ 1 Seld. Soc'y, Nos. 4, 9, 11, 24.

⁸ Fleta, 59; 1 Nich. Br. 48*b*.

⁹ 1 Nich. Brit. 49*b*, 2 Tw. Br. 473; Fleta, 60, Lib. I. c. 42.

appeal, and at the same time gave the plaintiff the advantage of a less technical and dilatory procedure, and particularly the benefit of trial by jury, those appeals would naturally become infrequent; and there are hardly any reported cases of appeal of wounding or imprisonment in the Year Books, and not many appeals of mayhem. The latest case that I have found of appeal of mayhem is that of *Hudson v. Lee* (1590), in which a plaintiff who had obtained damages in trespass sought unsuccessfully to recover additional damages in an appeal.¹

The punitive appeals would *a fortiori* give way to trespass as the only mode of obtaining compensation. In fact appeals of rape, arson, and robbery and larceny other than those for the recovery of stolen goods were uncommon. The appeal of arson is said to have become obsolete in the time of Hawkins (1716). This, however, is not true in the case of appeal of death.

The introduction of public prosecution did not supersede the old private suit by appeal. Indeed the new remedy could be employed only where the individual wronged, or his kinsman in case of death, failed to sue an appeal in due season. Originally suit in all appeals must be brought at the next county court. By Stat. 6 Ed. I. c. 9 the appellor was allowed a year and a day.²

In case of homicide the practice seems to have been growing to indict the defendant before the year and day expired, but the old rule was restored in 1482.³

¹ 4 Rep. 43; Moore, 268; 1 Leon. 318, s. c. A similar case was *Rider v. Cobham* (1578), 1 Leon. 319 (cited); 1 Leon. 19 (cited). Very possibly there are later cases. See Y. B. 41 Lib. Ass. 16: one who had an appeal of mayhem and writ of trespass for the same wounding was driven to elect. Y. B. 14 Hen. VII. 10, 20: one has election between appeal of mayhem and of trespass, just as a disseisee may have assize or trespass.

² The procedure of appeal is recognized in Britton, *supra*, and in Y. B. 40 Ass. pl. 40 (1367). "Altho' if he (defendant) had put himself for good or ill upon the jury within the year, still he should not be tried or executed, because he is not arraignable within the year, for the benefit of the party's appeal." See also Staunf. P. C. 107 a. b. Conf. Y. B. 21 Ed. III. 23, 16.

³ 22 Ed. IV. Fitz. Cor. 44. "Note that all the judges of both benches said that it was their common opinion, if one be indicted for the death of another, that he should not be arraigned within a year for the said felony at the King's suit, and they counselled all lawyers to execute this point as a law without variance so that the suit of the party might be saved."

In 1 Stephen Hist. Crim. Law, 248, the learned author characterizes this ruling of the judges, which was the common law, as an "act of judicial legislation of an almost unexampled kind."

In 1487 this law as to appeals of death was changed by a statute¹ the preamble of which states "and over this it is used that within, the year and a day after any death or murder had or done, the felony should not be determined at the king's suit, for saving of the party's suit; wherein the party is sometimes slow, and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder," and the enacting clause of which is to the effect that party indicted should be arraigned and tried at the king's suit at any time, but that in case of acquittal the defendant should be liable to appeal by the widow or next heir of the deceased within a year and day. A widow or heir, by allowing the indictment to go on, really had a double chance. A conviction could also be had by indictment without personal risk of duel in case of the heir.

Appeals of death diminished after this.²

The procedure in the Anglo-Norman period in an appeal of robbery or larceny is described by Glanvill, Bracton, Britton, and Fleta.³ Britton's account is the fullest.⁴ The victim of the theft upon the discovery of his loss raised hue and cry, and with his neighbors made fresh pursuit after the thief. If the latter was caught, on fresh pursuit, with the "mainour," *i. e.*, with the pursuer's goods in his possession, the case was disposed of in the most summary manner. The prisoner was taken at once to an impromptu court, and if the pursuer, with others, made oath that the goods had been stolen from him, was straightway put to death without a hearing, and the pursuer recovered his goods. Britton's statement is borne out by several reported cases.⁵

¹ 3 Hen. VII. c. I.

² *Ashford v. Thornton*, 1 B. & Ald. 405 (1819), the last case of appeal of death, was after the defendant had been acquitted on indictment.

³ Glanvil, Bk. 10, ch. 15-17; Bract. 150 b-152; 1 Nich. Britt. 55-60; Fleta, Lib. I. ch. 38; see also *Mirror of Justices*, Seld. Soc'y, Bk. III. c. 13.

⁴ Britt. 23 b.

⁵ Northumberland Assize Rolls, 79 (40 Hen. III.). "*Stephanus de S . . . captus fuit cum quodam equo furato per sectam Willelmi T et decollatus fuit, praesente ballivo domini Regis, et praedictus equus deliberatus fuit praedicto W qui sequebatur pro equo illo in pleno comitatu.*" In 1271 one Margaret appealed Thomas and Ralph for killing her brothers. But she was imprisoned for her false appeal, since Thomas and Ralph, who had pursued and beheaded her brothers as thieves taken with the "mainour," had acted according to the law and custom of the realm. Pl. Ab. 184, col. 1, rot. 24. This custom was condemned by the justices, in 1302, who said that one who had beheaded a manifest thief should be hanged himself. Y. B. 30 & 31 Ed. I. 545. See 2 Pollock & Maitland, *Hist. Eng. Law*, 495.

If not taken freshly on the fact, the person found in possession of the chattel had a right to be heard. The appellor, placing his hand upon the chattel,¹ charged the appellee with the theft. There were several modes of meeting the charge. The appellee might deny it *in toto*. The controversy was then settled by wager of battle, unless the appellee preferred a trial by jury.² The chattel went to the winner in the duel.

The appellee might, on the other hand, claim merely as the vendee or bailee of a third person. He would then vouch this third person as a warrantor to appear and defend the appeal in his stead. Glanvill gives the writ to compel the appearance of the warrantor.³ If the warrantor failed to appear, or, appearing, successfully disputed the sale or bailment by wager of battle,⁴ the appellor recovered the chattel, and the appellee was hanged. If the appellee won in the duel with the vouchee, the vouchee was hanged.⁵ If the warrantor came and acknowledged the sale or bailment, the chattel was put temporarily in his hands, the appellee withdrew from the appeal, and the appellor thereupon appealed the warrantor as the thief, or with the words that he knew no other thief than him.⁶ The warrantor might in his turn vouch to warranty or dispute the appellor's right. If the appellor was finally successful against any warrantor, he recovered the chattel. If he was unsuccessful, the chattel was restored to the original appellee. This vouching to warranty is to be regarded as the following up of the trail of the thief, whose capture is an essential object of the whole procedure.

The appellee might, thirdly, though having no one to vouch as a warrantor, claim to have bought the chattel at a fair or market. Upon proof of this he was acquitted of the theft; but the appellor, upon proof of his former possession and loss of the chattel, recovered it. There was, as yet, no doctrine of purchase in market overt.

¹ Bract. Note Book, No. 824.

² As early as 1319 the rule was established that a thief taken with the "mainour" could not defend an appeal by wager of battle, but must put himself upon the jury; "for the appeal has two objects, to convict the thief and to recover the stolen chattel, and the law recognizes that the thief, though guilty, might by bodily strength vanquish the appellor and thus keep the chattel without reason." Fitz. Cor. 375. See also Fitz. Cor. 157, 125, 100, 268.

³ Book, X. ch. 16.

⁴ Sel. Pl. of Crown, 1 Seld. Soc'y, No. 124.

⁵ Bract. Note Book, No. 1435.

⁶ Sel. Pl. of Crown, 1 Seld. Soc'y, No. 192; Bract. Note Book, No. 67.

This private proceeding for the capture of the thief and recovery of the stolen chattel, as described in English law treatises and decisions of the thirteenth century, is of Teutonic origin. Its essential features are found in the Salic law of the fifth century;¹ but by the middle of the thirteenth century this time-honored procedure had seen its best days. The public prosecution of crime was introduced by the Assize of Clarendon in 1166, and with the increasing effectiveness of the remedy by indictment the victims of robbery or theft were more and more willing to leave the punishment of wrongdoers in the hands of the crown. On the other hand, the path of him who would use the appeal as a means of recovering the chattel stolen from him was beset with difficulties.

The appellor must, in the first place, have made fresh pursuit after the thief. In 1334 it was said by counsel that if he whose goods were stolen came within the year and a day, he should be received to have back his chattels. But ALDEBURGH, J., answered: "Sir, it is not so in your case, but your statement is true in regard to waif and estray."²

Secondly, the thief must have been captured by the appellor himself or one of his company of pursuers. In one case the owner of the stolen chattel pursued the thief as far as a monastery, where the thief took refuge in the church and abjured the realm. Afterward the coroner delivered the chattel to the owner because he had followed up and tried to take the thief. For having foolishly delivered the chattel the coroner was brought to judgment before the justices in eyre.³ So if the thief was arrested on suspicion by a bailiff, the king got the stolen chattel, because the thief was not arrested by the party.⁴

¹ Sohm, *Der Process d. Lex Salica*; Jobbé-Duval, *La Revendication des Meubles*; Brunner, *Rechtsgeschichte*, I. 495 *et seq.*; Schroeder, *Lehrbuch d. deutschen Rechtsgeschichte*, 346 *et seq.*

² Y. B. 8 Ed. III. f. 10, pl. 30. See also Abb. Plac. 280, col. 2, rot. 1 (16 Ed. I.); Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 7 Hen. IV. f. 31, pl. 16; Y. B. 7 Hen. IV. f. 43, pl. 9; Roper's Case, 2 Leon. 108. In a case cited in Sel. Pl. Ct. Adm. 6 Seld. Soc'y, XL., restitution was ordered in the Admiralty Court "because by the law maritime the ownership of goods taken by pirates is not divested unless the goods remain in the pirates' possession for a night." See also Y. B. 7 Ed. IV. f. 14, pl. 5; and compare Y. B. 22 Ed. III. f. 16, pl. 63.

³ Y. B. 30 & 31 Ed. I. 527.

⁴ Fitz. Cor. 379 (12 Ed. II.). See also Y. B. 30 & 31 Ed. I. 509; Y. B. 30 & 31 Ed. I. 513; Fitz. Cor. 392 (8 Ed. II.); Fitz. Cor. 190, criticizing Y. B. 26 Lib. Ass. 17.

Thirdly, the thief must be taken with the goods in his possession. If, for instance, the goods were waived by the thief and seized by the lord of the franchise before the pursuers came up, the lord was entitled to them.¹

Fourthly, the thief must be convicted on the pursuer's appeal. "It is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."² In one case the verdict in the case was not guilty, and that the appellee found the goods in the highway. The goods were present in court. It was asked if the goods belonged to the appellor, and found that they did. Nevertheless, they were forfeited to the king.³ In another case the thief was appealed by three persons for different thefts. He was convicted upon the first appeal and hanged. The goods of the two other appellors were forfeited to the king.⁴ The result was the same if the pursuer's failure to convict was because the thief rather than be taken killed himself,⁵ or took refuge in a church and abjured the realm,⁶ or died in prison.⁷

Finally, since the rule which denied the right of defense by wager of battle to one taken with the "mainour" seems not to have been established before the fourteenth century, the appellor was exposed to the risk of defeat and consequent loss of his chattels by reason of the greater physical skill and endurance of the appellee. There was the danger, also, that an appellee of inferior physical ability might fraudulently vouch as a warrantor an expert fighter, who, as a paid champion, would take the place of the original ap-

¹ *Dickson's Case*, Hetley, 64. But see *Rook and Denny*, 2 Leon. 192.

² Y. B. 8 Ed. III. f. 10, pl. 30; Fitz. Avow. 151, per Schardelow, J. *Acc.* Y. B. 30 Ed. I. 526; Y. B. 30 Ed. I. 512, 513; Fitz. Cor. 318, 319, 162. See also Fitz. Cor. 379; Y. B. 7 Ed. IV. 43, 9, where, however, it is not clear that the appellor got his goods.

³ Fitz. Cor. 367 (3 Ed. III.).

⁴ Y. B. 44 Ed. III. f. 44, pl. 57; Fitz. Cor. 95. But see Y. B. 7 Hen. IV. f. 31, pl. 16, Fitz. Cor. 21; and compare Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26.

⁵ Fitz. Cor. 318 (3 Ed. III.).

⁶ Y. B. 30 Ed. I. 527; Fitz. Cor. 162 (3 Ed. III.). But see Fitz. Cor. 380 (12 Ed. II.), *semble*, and Y. B. 26 Lib. Ass. 32, Fitz. Cor. 194 (*semble*), *contra*.

⁷ Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26. But see *contra*, Fitz. Cor. 379 (12 Ed. II.) and Fitz. Forf. 15 (44 Ed. III.). In the last half of the fourteenth century this rule was so far relaxed that the pursuer might recover his chattels if the conviction of the thief was prevented by his standing mute. Y. B. 26 Lib. Ass. 17; Y. B. 44 Lib. Ass. 30; Y. B. 8 Hen. IV. f. 1, pl. 2, Fitz. Cor. 71; or claiming benefit of clergy: Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 10 Hen. IV. f. 5, pl. 18, Fitz. Cor. 466; Y. B. 2 R. III. f. 12, pl. 31; Y. B. 3 Hen. VII. f. 12, pl. 10.

pellee. To avoid the duel with this champion, the appellor must establish by his *secta* or by an inquest that the ostensible warrantor was a hired champion.¹

By the time of Henry VIII. the conditions of restitution seem to have been reasonable diligence in pursuing the thief, and either the conviction of the thief on appeal or his confession, express or implied, of guilt.² Originally no indictment could be tried until the owner had forfeited his right to appeal by laches.³ But the practice afterwards changed, and the crown did not stay for the appellor to bring his appeal.⁴

There was originally no restitution of goods after conviction on an indictment.⁵ A statute⁶ remedied this, by providing that one

¹ The appellor succeeded in doing so in the case reported in Sel. Pl. Cor., 1 Seld. Soc'y, No. 192, and the champion with special leniency was condemned to the loss of one of his feet, instead of losing both foot and fist.

² 26 Eliz. Doylie's Case, 4 Leon. 16. Appeal of Robbery. "It was agreed by the Justices that the party robbed shall have appeal of robbery 20 years after robbery committed, and shall not be bound to bring it within a year and a day, as in the case of appeal of murder. *Vide contra*, 22 Ass. 97. *Vide* Staunf. 62."

³ 8 W. III. Armstrong v. Lisle, J. Kelying, 93, 96.

"But great question hath been made, of what should be accounted a fresh suit; *vide* Staunf. P. C. 165, 166, where, upon consideration of all the books, it is settled that it is not capable of any certain definition, but must be determined by the discretion of the Justices." Seasonable prosecution of the action seems here to be confounded with fresh pursuit of felon.

⁴ Britt. 46 b; Y. B. 15 Ed. III. 153, 155. There was at one time a tendency to relax this rule where the proper appellor was an infant. Y. B. 21 Ed. III. 23, 16; Y. B. 11 Hen. IV. 94, 56; 13 Hen. VI., Fitz. Cor. 278. The reason given was that the opportunity for covin on the part of the defendant was so great. 22 Hen. VI., Fitz. Cor. 279. In Y. B. 31 Hen. VI. 11, 6, an indictment for robbery was allowed to go on pending an appeal for robbery, because it was not plain that the appeal was for the same robbery; the case, therefore, differing from an appeal of death. The strict ancient law was restored in 22 Ed. IV., Fitz. Cor. 44.

⁵ Markham v. Cobb, W. Jones, 147, 148, per Sir W. Jones, J. "If the king causes one to be indicted and convicted and attainted, or if at the king's suit he be acquitted, this is a bar in appeal of felony; in the same manner if the party is acquitted, convicted or attainted at the suit of the party in appeal, this is a bar in arraignment on indictment; and at the common law they used to stay proceedings on indictment till a year and a day was passed, because it would not be a bar to the appeal, but since divers times the evidence of the crown was lost or concealed, therefore afterwards the practice changed and they do not stay (indictment) and to prevent mischief to party (appellor) who in this way several times lost his appeal (and therefore failed to recover the goods) this Statute of 21 Hen. VIII. was made to give restitution to the party of his goods if he gave evidence."

⁶ 22 Ed. III., Fitz. Cor. 460; Y. B. 4 Hen. VII. 5, 1; Markham v. Cobb, Latch, 144.

⁷ Stat. 21 Hen. VIII. C. 11.

whose goods had been stolen should have restitution on indictment if he procured conviction or gave evidence against the convicted thief. Appeal of robbery disappears after this statute, and was abolished by law in 1819. The statute is construed liberally; *e. g.*, if thief had parted with the stolen property, but had other property, procured by means of the stolen goods, the party despoiled obtained the substituted property.¹ An executor had restitution, though not expressly mentioned in the statute.² The writ of restitution soon became obsolete; action of trover was allowed instead.³ Restitution or trover is allowed against a purchaser in market overt,⁴ but only in case defendant retains the goods purchased after conviction. If he has resold them before conviction, the remedy is only against the new possessor.⁵ By a late English statute⁶ restitution is allowed where goods are obtained under false pretenses, even though the false pretenses are such as to vest a defeasible title in the fraudulent pretender, and the latter has sold to an innocent purchaser.⁷

¹ 5 Jac. Haris' Case, Noy, 128; 41 Eliz. Holiday v. Hicks, Cro. El. 661. Golightly v. Reynolds, Loft, 88, a good case. Historical note.

² 3 Eliz. Austen v. Baker, Dy. 201, 6 Rep. 80, Benl. 87.

³ Golightly v. Reynolds, *supra*.

⁴ Kelying, 35, 47. See Worcester's Case, Moore, 360, Poph. 84, 1 And. 344, 5 Rep. 83 b; Smart's Case, Freem. 460; Scattergood v. Sylvester, 15 Q. B. 506; Walker v. Matthews, 8 Q. B. D. 109.

⁵ Horwood v. Smith, 2 T. R. 750.

⁶ 24-25 Vict. c. 96, sect. 100.

⁷ Vilmont v. Bentley, 18 Q. B. Div. 322; Bentley v. Vilmont, 12 App. Cas. 471, overruling Moyce v. Newington, 4 Q. B. D. 32. See Rex v. Powell, 7 C. & P. 640; Queen v. Justices, 18 Q. B. Div. 314. Nothing of the kind known in the United States.

LECTURE IV.

TRESPASS DE BONIS ASPORTATIS.

It is obvious from this account of the appeal of robbery or larceny that the absence of pecuniary redress against a thief must sooner or later become an intolerable injustice to those whose goods had been stolen, and that a remedy would be found for this injustice. This remedy was found in the form of an action for damages, the familiar action of Trespass de Bonis Asportatis.

The recorded instances of trespass in the royal courts prior to 1252 are very few. In the "Abbreviatio Placitorum" some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1194-1252, but not a single case of trespass.¹ In the year 37 Henry III. (1252-1253) no fewer than twenty-five cases of trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought. It is reasonable to suppose that the writ of trespass was at first granted as a special favor, and became, soon after the middle of the fourteenth century, a writ of course.

The introduction of this action was a very simple matter. An original writ issued out of Chancery directing the sheriff to attach the defendant to appear in the King's Bench to answer the plaintiff. The jurisdiction of the King's Court was based upon the commission of an act *vi et armis* and *contra pacem regis*, for which the unsuccessful defendant had to pay a fine. These words were therefore invariably inserted in the declaration. Indeed, the count in trespass was identical with the corresponding appeal, except that it omitted the offer of battle, concluded with an *ad damnum* clause, and substituted the words *vi et armis* for the words of felony, — *feloniter, felonice, in felonia*, or *in robberia*. The count in the appeal was doubtless borrowed from the ancient count in the popular or communal courts, the words of felony and *contra pacem regis* being added to bring the case within the jurisdiction of the royal courts.²

¹ See, however, *infra*, p. 179, n. 3. — Ed.

² As there was no appeal for a trespass upon land, Sel. Pl. Cor. (Seld. Soc'y), No. 35, the action of trespass *quare clausum fregit* was brought into the royal courts directly from the popular courts.

The procedure of the King's courts was much more expeditious than that of the popular courts, the trial was by jury¹ instead of by wager of law, and judgment was satisfied by levy of execution and sale of the defendant's property, whereas in the popular courts distress and outlawry were the limits of the plaintiff's rights. As an appeal might be brought for the theft of any chattel worth 12*d.* or more, and as the owner now had an option to bring trespass where an appeal would lie, there was danger that the royal courts would be encumbered with a mass of petty litigation. To meet this threatened evil the Statute 6 Ed. I. c. 8 was passed, providing that no one should have writs of trespass before justices unless he swore by his faith that the goods taken away were worth forty shillings at the least.

The plaintiff's right in trespass being the same as the appellor's right in the appeal, we may consider them together. Bracton says the appeal is allowed "*utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua.*"² Britton and Fleta are to the same effect.³ The right is defined with more precision in the "Mirror of Justices": "In these actions (appeals) two rights may be concerned, — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing had been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs."⁴ The gist of the plaintiff's right was, therefore, possession, either as owner or as bailee.⁵ On the death of an owner in possession of a charter the heir was constructively in possession, and could maintain trespass against one who anticipated him in taking physical possession of the charter.⁶

¹ In one case the defendant offered wager of battle and the plaintiff agreed, but the court would not allow it. Y. B. 32 & 33 Ed. I. 319.

² Bract. 151. To the same effect, Bract. 103 *b*, 146 *a*.

³ 1 Nich. Britt. 56; Fleta, Lib. 1, c. 39.

⁴ Book II. c. 16 (Seld. Soc'y).

⁵ For instances of appeals by bailees see Sel. Pleas of the Crown, Nos. 88 and 126, and for a recognition of the bailee's right in later times, Fitz. Cor. 100 (45 Ed. III.); Y. B. 2 Ed. IV. f. 15, pl. 7; Keilw. 70, pl. 7.

⁶ Y. B. 16 Ed. II. 490; Y. B. 1 Ed. III. f. 22, pl. 11. The owner could not have the action against a second trespasser, for the possession of the first trespasser, being adverse to owner, could not be regarded as constructively the owner's.

The bailor could not maintain an appeal, nor could he maintain the analogous *Anefangsklage* of the earlier Teutonic law.¹ He had given up the possession to the bailee, retaining only a *chose* in action. For the same reason the bailor was not allowed for many years to recover damages in trespass. As early as 1323, however, and doubtless by the fiction that the possession of a bailee at will was the possession of the bailor also, the latter gained the right to bring trespass.² In 1375 CAVENDISH, J., said: "He who has property may have trespass, and he who has custody another writ of trespass." And Persay answered: "It is true, but he who recovers first shall oust the other of his action."³ And this has been the law ever since where the bailment was at the will of the bailor. The innovation was not extended to the case of the pledgor,⁴ or bailor for a term.⁵

This same distinction between a bailment at will and a bailment for a time is pointedly illustrated by the form of indictment for stealing goods from the bailee: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. . . . The ground of the decision in *Rex v. Belstead* and *Rex v. Brunswick* was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass."⁶

In like manner, it is probable that for an estray carried off trespass might have been brought by either the owner or the lord within the year and a day.⁷ A servant could not bring trespass unless he had been entrusted with goods as a bailee by or for his

¹ 1 Brunner, *Deutsche Rechtsgeschichte*, 509.

² Y. B. 16 Ed. II. 490; Y. B. 5 Ed. III. f. 2, pl. 5.

³ Y. B. 48 Ed. III. f. 20, pl. 16.

⁴ Y. B. 10 Hen. VI. f. 25, pl. 16.

⁵ *Ward v. Macaulay*, 4 T. R. 489.

⁶ Per BAYLEY, B., as cited in 2 Russ. Crimes (5th ed.), 245. The same distinction is made in 1 Hale P. C. 513.

⁷ Y. B. 20 Hen. VII. f. 1, pl. 1. But in this same case the right of a distrainer to have trespass was denied.

master.¹ Nor could a servant maintain an appeal without his master.²

Trespass was an action for damages only,³ *i. e.*, a strictly personal action. But being a substitute for the appeal, which gave the successful appellor the stolen *res*, the measure of damages would naturally be the value of the stolen *res*. This was the rule of damages even though the action was brought by a bailee⁴ or by a trespasser against a second trespasser. The rule was at one time thought to be so inflexible as to deprive a bailee for a time of the right to bring trespass for a wrongful dispossession by his bailor. HANKFORD, J., said in one case: "Plaintiff shall not have the action, because then he would recover damages to the value of the beasts from him who owned them, and this is not right. But the plaintiff shall have an action on the case. But if a stranger takes beasts in my custody I shall have trespass against him and recover their value, because I am chargeable to my bailor who has the property, but here the case is different *quod* HILL and CULPEPPER, JJ., *concesserunt*."⁵ It is needless to say that this is no longer law. The plaintiff has for centuries been allowed to recover in trespass against the bailor his actual loss.⁶ On the same principle it was once ruled that a plaintiff could not have trespass if his goods had been returned to him; "for, as FULTHORP, J., said, the plaintiff ought not to have his goods and recover value too, therefore he should recover damages in trespass on the case for the detainer."⁷ But PASTON, J., said the jurors should allow for the return of the chattel in assessing the damages, and his view has, of course, prevailed.⁸

¹ Y. B. 2 Ed. IV. f. 15, pl. 7, per Littleton; Heydon's Case, 13 Rep. 69; Bloss v. Holman, Ow. 52, per ANDERSON, C. J.; Goulds. 66, pl. 10, 72, pl. 18, s. c.

² The master could bring an appeal against a thief and offer to prove by the body of his servant who saw the theft, and the servant would accordingly charge the appellee of the same theft, and offer to prove by his body. 1 Rot. Cur. Reg. 51; 3 Bract. Note Book, No. 1664. See also Y. B. 30 & 31 Ed. I. 542; Fitz. Replev. 32 (19 Ed. III.).

³ Pl. Ab. 336, col. 2, rot. 69 (14 Ed. II.); *ibid.* 346, col. 2, rot. 60 (17 Ed. II.); Y. B. 1 Hen. IV. f. 4, pl. 5.

⁴ Y. B. 11 Hen. IV. f. 23, pl. 46; Y. B. 8 Ed. IV. f. 6, pl. 5; Heydon's Case, 13 Rep. 67, 69; Swire v. Leach, 18 C. B. N. s. 479. There are numerous cases in this country to the same effect. See, however, Claridge v. South Staffordshire Co., 1892, 1 Q. B. 422.

⁵ Y. B. 11 Hen. IV. f. 23, pl. 46.

⁶ Heydon's Case, 13 Rep. 67, 69; Brierly v. Kendall, 17 Q. B. 937.

⁷ Y. B. 21 Hen. VI. f. 15, pl. 29.

⁸ Br. Ab. Tresp. 221, 130; Chinnery v. Vial, 5 H. & N. 288, 295. See also Y. B. 21 & 22 Ed. I. 589.

The close kinship between the appeal and trespass explains the nature of the trespasser's wrong to the plaintiff. A robber or thief dispossesses the owner with the design of excluding him from all enjoyment of the chattel. His act is essentially the same as that of one who ejects another from his land, *i. e.*, a disseisin. Indeed, in many respects the recuperatory appeal of robbery or larceny is the analogue of the assize of novel disseisin. It is not surprising, therefore, to find that trespass for an asportation would not lie originally except for such a dispossession as in the case of land would amount to a disseisin.¹ If, for instance, a chattel was taken as a distress, trespass could not be maintained.² Replevin was the sole remedy. In 1447 the Commons prayed for the right to have trespass in case of distress where the goods could not be come at.³

In one respect trespass differed materially from the appeal and also from the assize of novel disseisin. The disseisee and the owner of the chattel could recover the land or the chattel from the grantee of the disseisor or thief. But the dispossessed owner of a chattel could not bring trespass for the value of the chattel against the grantee of the trespasser.⁴ Even here, however, the analogy did not really fail. Trespass was an action to recover damages for a wrong done to the plaintiff by taking the chattel from his possession. The grantee of the trespasser had done no such wrong. Therefore, no damages were recoverable, and the action failed altogether. Similarly the grantee of the disseisor had done no wrong to the disseisee, and therefore, while he must surrender the land, he was not obliged, prior to the Statute of Gloucester, to pay damages to the demandant.⁵ On the contrary, the demandant was *in miseri-*

¹ Trespass for the destruction of a chattel has been allowed from very early times. Y. B. 1 Ed. II. 41; Y. B. 11 Ed. II. 344; Y. B. 2 Ed. III. f. 2, pl. 5; Watson v. Smith, Cro. El. 723. There is in the *Registrum Brevium* no writ of trespass for a mere injury to a chattel, not amounting to its destruction. Presumably it was thought best that plaintiffs should seek redress for such minor injuries in the popular courts. There is an instance of such an action in 1247 in a manorial court of the Abbey of Bec. Sel. Pl. Man. Ct. (Seld. Soc'y) 10. In later times the remedy in the King's Bench was by an action on the case. Slater v. Swan, 2 Stra. 872. See also Marlow v. Weekes, Barnes's Notes, 452. Finally, trespass was allowed without question raised. Dand v. Sexton, 3 T. R. 37.

² Pl. Ab. 265, col. 2, rot. 8 (32 Ed. I.).

³ 5 Rot. Parl. 139 b. (399 a seems to be the same petition.)

⁴ Y. B. 21 Ed. IV. f. 74, pl. 6; Day v. Austin, Ow. 70; Wilson v. Barker, 4 B. & Ad. 614.

⁵ Bract. 164, 172, 175 b; 2 Bract. Note Book, No. 617; Y. B. 37 Hen. VI. f. 35, pl. 22; Y. B. 13 Hen. VII. f. 15, pl. 11; Symons v. Symons, Helt. 66.

cordia if he charged the grantee with disseisin.¹ By the same reasoning, just as the dispossessed owner of a chattel could not have trespass against a second trespasser,² so the demandant could not recover damages from a second disseisor.³ The wrong in each case was against the first trespasser or disseisor, who had gained the fee simple or property, although a tortious fee simple or property.

The view here suggested, that the defendant's act in trespass *de bonis asportatis* was essentially the same as that of a disseisor in the case of land, has put the writer upon the track of what he believes to be the origin of the familiar distinction in the law of trespass *ab initio* between the abuse of an authority given by law, and the abuse of an authority given by the party, the abuse making one a trespasser *ab initio* in the one case but not in the other. As we have seen, replevin, and not trespass, was the proper action for a wrongful distress. If, however, when the sheriff came to replevy the goods, the landlord, claiming the goods as his own, refused to give them up, the replevin suit could not go on; the plaintiff must proceed either by appeal of felony, or by trespass.⁴ The defendant by this assumption of dominion over the goods and repudiation of the plaintiff's right was guilty of a larceny and trespass. Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The plaintiff as before was driven to his appeal or trespass.⁵

Early in the reign of Edward III. the law was so far changed that the defendant's claim of ownership would not defeat the replevin action unless made before deliverance of the goods to the sheriff.⁶ But the old rule continued, if the distrainer claimed

¹ 2 Bract. Note Book, Nos. 617 and 1191.

² Y. B. 21 Ed. IV. f. 74, pl. 6. See the Harvard Law Review, Vol. III. p. 29.

³ Br. 172.

⁴ "If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villein of the deforcer, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony if he thinks fit to do so." 1 Nich. Britt. 138. In Y. B. 21 & 22 Ed. I. 106, counsel being asked why the distrainer did not avow ownership when the sheriff came, answered: "If we had avowed ownership, he would have sued an appeal against us."

⁵ Y. B. 32 & 33 Ed. I. 54.

⁶ The argument of the defendant, "And although we are come to court on your suit,

ownership before the sheriff, until, by the new writ, *de proprietate probanda*, the plaintiff procured a deliverance in spite of the defendant's claim, and thus was enabled to continue the replevin action as in the case of a voluntary deliverance. But the resort to this writ was optional with the plaintiff. He might still, if he preferred, treat the recusant defendant as a trespasser. In Rolle's Abridgment we read: "If he who has distrained detains the beasts after amends tendered before impounding, he is a trespasser *ab initio*. 45 Ed. III. 9 b. *Contra*, Co. 8, Six Carpenters, 147."¹

What was true in the case of a distress was equally true of an estray. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirree*) in form of trespass, or an appeal of larceny, by words of felony."² In 1454 PRISOT, J., in answer to counsel's suggestion that, if he lost a box of charters, he should have detainue, said: "I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice."³

On the other hand, a bailee who, in repudiation of his bailor's rights, refused to give back the chattel on request was never chargeable as a thief or trespasser.⁴ Unlike the distrainor or finder, who took the chattel without the consent of the owner but by virtue of a rule of law, the bailee did not acquire the possession by a taking, but by the permission and delivery of the bailor. Hence it was natural to say that a subsequent tort made one a trespasser *ab initio* if he came to the possession of a chattel by act of law, but not if he came to its possession by act of the party. The rule once established in regard to chattels was then extended to trespasses upon realty and to the person.

we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. Y. B. 5 Ed. III. f. 3, pl. 11; see the *Harvard Law Review*, Vol. III. p. 32.

¹ 2 Roll. Abr. 561 [G], 7. The Year Book supports Rolle.

² 1 Nich. Britt. 68. See *ibid.* 215: "No person can detain from another birds or beasts, *feræ naturæ*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays."

³ Y. B. 33 Hen. VI. f. 26, pl. 12.

⁴ Y. B. 16 Hen. VII. f. 2, pl. 7; 1 Ames & Smith, Cases on Torts, 252, 253, n. 1.

The subsequent history of the doctrine of trespass *ab initio* is certainly curious. There seems to be no indication in the old books that anything but a refusal to give up the chattel would make the distrainor or finder a trespasser. But in the case, in which PRISOR, C. J., gave the opinion already quoted, Littleton, of counsel, insisted that detinue and not trespass was the proper action against the distrainor or finder for refusal to give up the chattel on demand, but admitted that trespass would lie if they killed or used the chattel.¹ Littleton's view did not at once prevail.² But it received the sanction of Coke, who said that a denial, being only a non-feasance, could not make one a trespasser *ab initio*;³ and their opinion has ever since been the established law. A singular departure this of Littleton and Coke from the ancient ways — the doctrine of trespass *ab initio* inapplicable to the very cases in which it had its origin!

¹ ' If I refuse to give up the distress, still he shall not have trespass against me, but detinue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters it was lawful, and although he did not give them up on request, he shall not have trespass, but detinue against me, for no trespass is done yet; no more than where one delivers goods to me to keep and redeliver to him, and I detain them, he shall never have trespass, but detinue against me *causa qua supra*." Y. B. 33 Hen. VI. f. 26, pl. 12.

² See Littleton's own statement when judge in Y. B. 13 Ed. IV. f. 6, pl. 2. According to Y. B. 2 Rich. III. f. 15, pl. 39: "It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detinue." In *East v. Newman* (1595), Golds. 152, pl. 79, a finder who refused to give up the goods to the owner was held guilty of a conversion, FENNER, J., saying: "For when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is."

³ *Isaac v. Clark*, 1 Roll. R. 126.

LECTURE V.

REPLEVIN.¹

THE gist of the action of trespass *de bonis asportatis*, as we have seen, was a taking from the plaintiff's possession under a claim of dominion. The trespasser, like a disseisor, acquired a tortious property. Trespass, therefore, would not lie for a wrongful distress; for the distrainer did not claim nor acquire any property in the distress. This is shown by the fact that he could not maintain trespass or trover if the distress was taken from him on the way to the pound, or taken out of the pound,² but must resort to a writ of *rescous* in the one case, and a writ of *de parco facto* in the other case. In these writs the property in the distress was either laid in the distrainee, or not laid in any one.³

But the distrainee, although debarred from bringing trespass, was not without remedy for a wrongful distress. From a very early period he could proceed against the distrainer by the action, which after a time came to be known as Replevin. This action was based upon a taking of the plaintiff's chattels and a detention of them against gage and pledge. Hence Britton and Fleta treat of this action under the heading "De Prises de Avers" and "De captione averiorum," while in Bracton and the Mirrour of Justices

¹ See 5 Ed. III. f. 56, pl. 81; for trespass *ab initio*, 1 Ames & Smith, Cas. on Torts, 247 *et seq.*; for wager of law in replevin, see 39 Hen. III. Abr. Pl. 143, rot. 1, Essex.

See further on replevin, *post*, disseisin of chattels.

² "The distrainer neither gains a general nor a special property, nor even the possession in the cattle or things distrained; he cannot maintain trover or trespass. . . . It is not like a pledgee, for he has a property for the time; and so of a bailment of goods to be redelivered, bailee shall have trespass against a stranger, because he is chargeable over." Per PARKER, C. B., *Rex v. Cotton, Parker*, 113, 121. See also Y. B. 21 Hen. VII. f. 1, pl. 1; *Whitly v. Roberts*, McClell. & Y. 107, 108; 2 Selw. N. P. (1st ed.) 1362; 2 Saund. (6th ed.) 47 b, n. (c).

³ "He shall not show in the writ to whom the property of the cattle doth appertain, unless he choose to do so." Fitz. N. B. 100. Compare *Bursen v. Martin*, Cro. Jac. 46, Yelv. 36, 1 Brownl. 192, s. c., in which case a count in trespass "*Quare equum cepit a persona querentis*" was adjudged bad for not alleging the horse to be "*suum*."

the corresponding titles are "De vetito namio" and "Vee de Naam."

In the earliest case found¹ the proceeding seems to have been wholly in the manorial court. Glanvill² gives a writ of replevin: "I command you that justly and without delay, you cause G. to have his beasts by gages and pledges of which he complained that R. has taken them and unjustly detains them for the customs which he exacts of him and which he does not acknowledge to owe him; and in the meantime cause it to be returned justly," &c. The procedure is fully described by Britton as follows:³

The plaintiff obtains a writ to the sheriff, and finds pledges to prosecute his plaint: the sheriff is thereupon to go and find the distress, which he is to deliver to plaintiff; and then he is to give a day to the parties at the next County Court. At this court the plaintiff counts that the defendant took his chattels and wrongfully detains the same against gage and pledges. The defendant might deny the same and have wager of law in County Court. But if the plea is removed to the King's Court, wager of law is not allowed because of the alleged breach of the peace. The defendant may avow for damage feasant, for rent in arrear, for feudal services, for judgment in lord's court, by lord of estray.

The plaintiff's right was the same as in trespass.⁴ Thus a bailee may have replevin; as, an agister,⁵ or a bailee at will.⁶ So a bailor

¹ Hen. I.: Ermenold v. Faritus, Bigelow, Pl. Ang. Nor. 131.

² Book 12, c. 12.

³ 1 Nich. Britt. 135-154 (f. 53 b-61 b).

⁴ Baker v. Campbell, 32 Mo. App. 529, and cases cited.

⁵ Y. B. 31 Ed. I. 424; Y. B. 2 Ed. III. 17, 19 (MOTFORD, J.: "S'il eit apprompt les bestes d'autre a manure sa terre, s'il soyent prise, la delivrance est a faire p. celui q. les ad en garde, quod non fuit negatum"); Y. B. 9 Ed. III. 14, 19. Action by J. Defendant avows taking of animals of R. being in his custody, "en son several." Plaintiff reaffirms his claim. HERLE, J.: He has avowed as of animals of R. being in his custody, "et per certain cause"; to which you must answer to whom the animals were. And if they were at time of taking in custody of R., action for this taking would belong to R.; for if R. counted for a tortious taking and you avowed as animals of J., he should maintain his plaint by saying they were in his, R.'s, custody at the time of the taking; and by the same reason he shall make you answer to this. . . . Afterwards issue was received that he took animals of R., and not those of J. . . . , and J. offered to aver that they were his without regard to the finding in custody of R.; and this was because defendant would not admit the property in J.; Y. B. 42 Ed. III. 18, 32. (Not necessary to count specially on agistment, but enough to allege "suas"); Y. B. 11 Hen. IV. 17, 39.

⁶ Y. B. 21 Hen. VII. 14, 23.

may have replevin,¹ though a lessor for a term cannot have the action.² And a lord is allowed replevin for beasts in the custody of his villein.³

In the earlier law a claim of property by the defendant put an end to the proceeding by replevin, and the plaintiff was driven to sue in trespass or by appeal.⁴ Early in the reign of Edward III., however, we find the King's Court taking a different view.⁵ An echo

¹ Chinn v. Russell, 2 Blackf. 172; Dunham v. Wyckhoff, 3 Wend. 280.

² Wyman v. Dorr, 3 Me. 183; see Y. B. 9 Ed. III. 14, 19.

³ Y. B. 32 Ed. I. 82.

⁴ 1 Nich. Britt. 138: "If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villein of the deforcer, let him immediately raise the hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." So also 1 Nich. Britt. 68, in case of estray: "And if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony."

Y. B. 21 & 22 Ed. I. 106, *plaint de veilo namio*:

"*Hertham*. Sir, why did you allow delivery of the beasts to be made? Why did you not avow the ownership?"

"*Hyham*. If we had avowed the ownership, he would have sued an appeal against us."

Y. B. 21 & 22 Ed. I. 586: Replevin; defendant alleges property in A. whose executor he is, and objects that he is not named as executor in writ. Plaintiff asserts ownership; defendant specially traverses. The writ was abated on other grounds; and no question was raised as to abating the writ because of the claim of property. Could an executor be said to disavow in this case?

Y. B. 32 Ed. I. 54: Replevin. Deliverance made by sheriff in county. Defendant pleads title in himself. Plaintiff objects to this plea, since defendant had allowed delivery to be made. Defendant. "Though sheriff did no wrong by delivery that ought [not] to hurt us here. HOWARD, J. You, who are plaintiff, will you sue in any other mode against A.? Plaintiff. Nay, but if the court can allow ownership to be tried in this writ, we will aver that the beast is ours, &c. HOWARD, J. The ownership cannot be tried in this writ; therefore the court adjudges, &c., that this beast be restored."

⁵ Y. B. 5 Ed. III. 3, 11. Replevin. Defendant claimed the goods as wreck. Plaintiff replied that defendant took the goods out of the custody of his merchants and seamen. *Bank*. "To such averment you shall not come, for if we had claimed property before the sheriff who came to make deliverance, he could have done nothing more on this writ, and although we are come to court on your suit, we shall not be in worse condition here than before the sheriff, for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate."

STONE, J. "You have claimed property for cause, to which he ought to have an answer, and the averment which he tenders he takes it from your answer and traverses the cause of your action; wherefore will you take the averment? And he was driven to take it."

of the old law occurs in the time of Henry IV.,¹ but the change was finally established.²

From the time of 5 Edward III., therefore, if deliverance was actually made to the plaintiff the suit in replevin would go on notwithstanding the defendant's claim of property; but if the defendant claimed property before the sheriff coming to make delivery, the power of the sheriff was at an end. He could make no delivery, and the replevin suit would terminate.³ Plaintiff would be driven to his action of trespass or appeal. To avoid this hardship, it would seem, a new writ was devised,—the writ *de proprietate probanda*. This was a writ issuing out of Chancery (though sometimes a judicament) directing the sheriff by an inquest of office to inquire if the goods are the property of plaintiff, and so to make deliverance to him and to command the parties to appear in court, &c. If the finding of the inquest was in plaintiff's favor and deliverance was made accordingly, plaintiff was in the same condition as if no claim of property had been made before the sheriff, and the latter had delivered in the first instance to the plaintiff. If inquest was for defendant, goods were left in the defendant's custody.⁴ But plaintiff might, not-

¹ Y. B. 7 Hen. IV. 28 b, 5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary. *Credo quod non est lex.*"

² Y. B. 21 Ed. IV. 64 a, 35. BRIAN, C. J. "If property be claimed before the sheriff, it shall be tried by writ *de proprietate probanda*, and if it be claimed here before us it shall be tried by the twelve." To same effect, Y. B. 26 Hen. VIII. 6, 27. In Y. B. 31 Hen. VI. 12, 1, the court said: "If defendant entitles himself to property of animals he may plead it in bar, but not to make avowry to have return; and so he may justify and plead in bar and not avow to have return. And I think the matter was demurred in law. And it was said one never avowed to have return except he affirmed property in plaintiff; and he might have claimed property at the time of replevin sued."

³ 18 Ed. II. Ab. Pl. 348-9, rot. 17. W. was attached to answer "*tam Domino Regi quam A., quare cum Dominus Rex nuper praecepit vicecomite quod replegiaret 8 boves et 5 vaccas ipsius A., apud, &c. Et cum vicecomes ad istos replegiandum venisset, idem W. averia illa sua propria esse falso advocavit. Et praedictus W. defendit quod nunquam illa cepit nec ea sua propria esse advocavit; sed per juratum comparatum est quod illa falso et maliciose advocavit esse sua propria, ad damnum ipsius W. (A.?) 20 Libras. Ideo committitur mareschallo, &c. Judicium contra ipsum pro dampnia.*" It would seem from this proceeding that the writ *de proprietate probanda*, i. e., the inquest of office, was not yet known.

⁴ Y. B. 11 Hen. IV. 4, 10. Replevin. Sheriff returned that defendant claimed property for his master so that he could not make the replevin.

TIRWHITT, J. By a claim of property by servant the sheriff ought not to have surceased to make replevin, for property between plaintiff and them cannot be tried by the sheriff, so sheriff shall be amerced.

HULL, J., *ad idem*. When property is claimed in replevin, writ *de proprietate pro-*

withstanding the verdict, bring trespass or appeal against the defendant.¹ The finding of the inquest for plaintiff was of no significance otherwise. Defendant in court might claim property, and the question would be tried by the jury without reference to the inquest. If the inquest resulted in favor of the defendant, the replevin suit was at an end.²

The earliest allusion to this writ that has been found is in 30 Edward III.;³ and a full statement of the procedure was made in the next year.⁴

"If the defendant claims property in the county, be the plea by plaint or by writ, the power of the sheriff is determined. But if the plea be before him by writ and defendant claims property, plaintiff may sue *sicut alias* or *vel causam nobis signif.*, and upon this the sheriff may return that defendant claims property; and upon this issues the writ *de prop. prob.*, returnable in Chancery or King's Bench or Common Bench. And although the sheriff find property for the defendant, this does not conclude the plaintiff from having a writ of trespass, because this is only an inquest of office; but if he brings a new Replevin, the sheriff shall not make deliverance. *Causa patet.* But when defendant claims property in bank, and upon this a writ *de prop. prob.* issues and it is found for defendant, plaintiff shall never have a writ of trespass. Ston. & Shard., 2 Ed. III., *Iter North.*⁵ Nevertheless *semble* that writ *de prop. prob.* shall not issue in this case, *i. e.*, when the parties appear in bank and defendant claims property without cause to entitle him to the beasts; to which the plaintiff may have an answer, and this shall be tried

banda shall issue to the sheriff to inquire of the property and if property be found for plaintiff, defendant for his claim shall pay fine and ransom to the King and damages to plaintiff. But for claim of servants a master ought not to pay fine, &c. "Afterwards a writ *de proprietate probanda* was awarded, as was said, but I did not hear."

¹ Fitz. Abr. Prop. Prob. 4.

² Gilbert, Distress, 115, 117.

³ Fitz. Abr. Prop. Prob. 3. "In Prop. Prob. if the sheriff find the property in plaintiff he shall make deliverance of the beasts to plaintiff and attach the defendant to answer as well to the King as to the party; and this agrees with the Register."

⁴ Fitz. Abr. Prop. Prob. 4. See also Y. B. 7 Hen. IV. 45, 3; Y. B. 14 Hen. IV. 25, 32; Y. B. 1 Ed. IV. 9, 18.

⁵ This writ *de proprietate probanda* probably came in in the reign of Edward III. The date 2 Ed. III., *supra*, is probably a misprint. "Ston," above mentioned, if a judge, must have been either Staunton, who ceased to be judge in 1 Ed. III., or Seton who was judge 29 Ed. III. Who was Shard? Shardelowe or Shardsburgh? [Both Stonore and Shardelowe were judges in 6 Ed. III.]

here. For I think that one shall not have writ *de prop. prob.* except upon the return of a sheriff."

The plea of property in a stranger and not in the plaintiff is a good plea.¹

The action of replevin was originally confined to cases of taking by wrongful distress.² The earliest allusion to the right to maintain replevin for a taking *vi et armis*, i. e., for a trespass as distinguished from a distress, that has been found is in the reign of Henry IV.³ "And it was said that if one takes beasts *contra pacem*, replevin lies not. *Gascoigne* said that he might elect to have replevin or writ of trespass. And some think not; for in the replevin if the sheriff returns that the defendant claims property and by writ *de proprietate probanda* it is found that the property is in the defendant, the plaintiff shall take nothing by his writ. And it was said that if defendant claims property in court and afterwards it is found that he has not property, the plaintiff shall recover all in damages; and others say not. *Quare*. And also it was said that if one claims property in court, against this claim the other shall not aver the contrary. *Credo quod non est lex*." And in the time of Henry VI. Chief Justice NEWTON said:⁴ "If you had taken my beasts, it is in my will to sue replevin, which proves property in

¹ Br. Abr. Tr. 382; Y. B. 11 Hen. IV. 79, 20; Y. B. 11 Hen. IV. 90, 47; Y. B. 20 Hen. VI. 18, 8; Y. B. 27 Hen. VIII. 21, 11; (1618) *Salkill v. Shelton*, 2 Roll. 64; (1674) *Wildman v. North*, 2 Lev. 92, 1 Vent. 249; (1692) *Butcher v. Porter*, 1 Show. 400, 1 Salk. 94, Carth. 243; (1697) *Parker v. Mellor*, 1 Ld. Ray. 217, Carth. 398, 12 Mod. 122; 19 Vin. Abr. 34, pl. 3; (1703) *Presgrove v. Saunders*, 6 Mod. 81, 1 Salk. 5, Holt, 562, 2 Ld. Ray. 914; (1703) *Crosse v. Bilson*, 6 Mod. 102; *Rogers v. Arnold*, 12 Wend. 30, 37.

In Y. B. 39 Hen. VI. 35, 47, issue for defendant, therefore he is entitled to return without avowry.

So the plea was held good in these cases: Y. B. 32 Ed. I. 82: plea that it was not plaintiff's beast; Y. B. 22 Ed. I. 586: plea that chattels belonged to P., whose executor defendant was; Y. B. 34 Ed. I. 148: plea that it was not plaintiff's beast, and issue thereon.

See also the following cases: Br. Abr. Replev. 8, 20; 2 Roll. Abr. 433 K. 1; 4 Bac. Abr. 395; 1 Inst. 145 b.

² See Lecture XV., Disseisin of Chattels.

³ Y. B. 7 Hen. IV. 28 b, 5.

⁴ Y. B. 19 Hen. VI. 65, 5. In Y. B. 8 Hen. VI. 27, 17, the same judge said that a writ of trespass, pending a replevin for same taking, "is abated for the 'contrariositie' of the supposal of the writs: for in Replevin I suppose the property in me and am to recover only damages for the taking; and in writ of trespass I suppose property out of me and am to recover the value of the chattels."

me, or to sue a writ of trespass which proves the property in him who took them; and so it is in my will to waive the property or not." In the time of Edward IV.¹ DANBY said: "If a man carry off my goods I shall have replevin."

A case of trespass *de bonis asportatis* in the time of Henry VII.² is to the same effect. The defendant objected that plaintiff had a replevin pending for same taking. "*Constable*. This is no plea, no more than if he had said that plaintiff had another writ of trespass pending for the same taking. BRIAN, C. J., & *tout le Court*. That is not so, for by the replevin he claims property, and by this writ of trespass he supposes the property to be out of him. And it is a good plea, held divers times in our books, to say in such a writ of trespass that the plaintiff has a writ of detinue pending for same thing. So it is as well to say that he has a replevin, for all is one reason." But in the same reign³ *Vavasor* said flatly that replevin would lie for any taking; and even BRIAN, C. J., admitted that replevin would lie, although not detinue. And it has been the law ever since that replevin may be brought for any wrongful taking.⁴ Yet we need not be surprised at Blackstone's statement that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress."⁵ And the attempt to extend the scope of the action so as to cover a wrongful detention without any previous taking was unsuccessful.⁶

¹ Y. B. 2 Ed. IV. 16, 8.

² Y. B. 14 Hen. VII. 12, 22.

³ Y. B. 6 Hen. VII. 7, 4. See accord, though for different reason, 7 Hen. IV. 15, 20.

⁴ *Ex parte Chamberlain*, 1 Sch. & Lef. 320, 320, n.; *Shannon v. Shannon*, 1 Sch. & Lef. 324; *George v. Chambers*, 11 M. & W. 149; *Mellor v. Leather*, 1 E. & B. 619; *Pangburn v. Partridge*, 7 Johns. 140; *Bruen v. Ogden*, 6 Halst. 370.

Recovery in trespass has been held no bar to replevin. *Anon.*, *Winch*, 26; *Field v. Jellicus*, 3 Levinz, 124. Replevin against one, who took as finder, was allowed in *Taylor v. James*, *Godb.* 150, pl. 195; *S. C. Noy*, 144.

⁵ 3 Bl. Com. 146; and see to the same effect *Co. Lit.* 145 b.

⁶ Replevin lies not at common law for a wrongful detention only. *Nightingale v. Adams*, 1 Show. 91; *Galloway v. Bird*, 4 Bing. 299; *Mennie v. Blake*, 6 E. & B. 842, 847; *Harwood v. Smethurst*, 5 Dutch. 195, and cases cited. But see *contra*, *Weaver v. Laurence*, 1 Dall. 156; *Keite v. Boyd*, 16 S. & R. 300; *Baker v. Fales*, 16 Mass. 147; *Seaver v. Dingley*, 4 Me. 306, 315. And by statute in many jurisdictions replevin is allowed for a detention.

LECTURE VI.

DETINUE.

THE appeal, trespass, and replevin were actions *ex delicto*. Detinue, on the other hand, in its original form, was an action *ex contractu*, in the same sense that debt was a contractual action. It was founded on a bailment; that is, upon a delivery of a chattel to be redelivered.¹ The bailment might be at will or for a fixed term, or upon condition, as in the case of a pledge. The contractual nature of the action is shown in several ways.

In the first place, the count must allege a bailment, and a traverse of this allegation was an answer to the action.² Again, detinue could not be maintained against a widow in possession of a chattel bailed to her during her marriage, because "*ele ne se peut obliger*."³ Nor, for the same reason, would the action lie against husband and wife on a bailment to them both.⁴ Thirdly, on a bailment to two or more persons, all must be joined as defendants, for all were parties to the contract.⁵ On the same principle, all who joined in bailing a chattel must be joined as plaintiffs in detinue.⁶ On the other hand, on the bailment by one person of a thing belonging to several, the sole bailor was the proper plaintiff.⁷ For it was not necessary in detinue upon a bailment, as it was in

¹ A buyer could also bring detinue against the seller for the chattel sold but not delivered. But the position of the seller after the bargain was essentially that of a bailee. For an early case of detinue by a buyer, see *Sel. Pl. Man. Cts.*, 2 *Seld. Soc'y* (1275), 138. The count for such a case is given in *Novae Narrationes*, f. 68. See also *Y. B. 21 Ed. III. f. 12, pl. 2*.

² *Y. B. 3 Ed. II. 78*; *Y. B. 6 Ed. II. 192*. Compare *Y. B. 20 & 21 Ed. I. 193*. After the scope of detinue was enlarged, a traverse of the bailment became an immaterial traverse. *Gledstane v. Hewitt*, 1 *Cr. & J.* 565; *Whitehead v. Harrison*, 6 *Q. B.* 423, in which case the court pointed out a serious objection to the modern rule.

³ *Y. B. 20 & 21 Ed. I. 189*. For the effect of marriage of a feme sole bailor, see *Y. B. 21 Hen. VII. 29, 4*.

⁴ *Y. B. 38 Ed. III. f. 1, pl. 1*; 1 *Chitty Pl.* (7th ed.) 104, 138.

⁵ *Y. B. 7 Hen. IV. f. 6, pl. 37*.

⁶ *Atwood v. Ernest*, 13 *C. B.* 881.

⁷ *Y. B. 8 Ed. II. 270*; *Y. B. 49 Ed. III. f. 13, pl. 6*, because "they [the owners] were not parties to the contract and delivery;" *Bellewe, Det. Charters*, 13 *R. II.*

replevin and trespass, to allege that the chattels detained were the "goods of the plaintiff."¹ Fourthly, the gist of the action of detinue was a refusal to deliver up the chattel on the plaintiff's request; that is, a breach of contract. Inability to redeliver was indeed urged in one case as an objection to the action, although the inability was due to the active misconduct of the defendant. "*Brown*. If you bail to me a thing which is wastable, as a tun of wine, and I perchance drink it up with other good fellows, you cannot have detinue, inasmuch as the wine is no longer *in rerum natura*, but you may have account before auditors, and the value shall be found." This, NEWTON, C. J., denied, saying detinue was the proper remedy.² It may be urged that the detinue in this case was founded upon a tort. But in truth the gist of the action was the refusal to deliver on request. This is brought out clearly by the case of *Wilkinson v. Verity*.³ The defendant, a bailee, sold the chattel entrusted to his care. Eleven years after this conversion the bailor demanded the redelivery of the chattel, and upon the bailee's refusal obtained judgment against him on the breach of the contract, although the claim based upon the tort was barred by the Statute of Limitations. The breach of contract is obvious where the bailee was charged in detinue for a pure non-feasance, as where the goods were lost.⁴ Fifthly, bailees were chargeable in *assumpsit*, after that action had become the common remedy for the breach of parol contracts.⁵ Sixthly, a traverse of the bailment was an answer to the action.⁶ Seventhly, detinue can be brought only in the county where the bailment took place.⁷ Eighthly, one

¹ *Whitehead v. Harrison*, 6 Q. B. 423, citing many precedents.

² Y. B. 20 Hen. VI. f. 16, pl. 2. To the same effect, 7 Ed. III., *Stath. Abr. Detinue*, pl. 9; Y. B. 17 Ed. III. f. 45, pl. 1; 20 Ed. III., *Fitz. Abr. Office del Court*, 22; Y. B. 12 Ed. IV. 12; Y. B. 1 Ed. V. 5, 12; Y. B. 1 R. III. 1, 2; Y. B. 10 Hen. VII. 7, 7.

³ L. R. 6 C. P. 206; *In re Tidd*, [1893] 3 Ch. 154; *Ganley v. Troy Bank*, 98 N. Y. 487, accord.

⁴ Y. B. 12 Ed. IV. 12; Y. B. 10 Hen. VII. 7, 14; *Reeve v. Palmer*, 5 C. B. N. S. 84.

⁵ *Wheatley v. Lowe*, *Palm.* 28; *Cro. Jac.* 668, s. c.

⁶ Y. B. 2 Ed. II. 78; Y. B. 6 Ed. II. 192 (but see Y. B. 20 Ed. I. 193); Y. B. 7 Hen. VI. 22, 3, per MARTIN, J. ("in action by bailor against bailee the bailment is traversable"); Y. B. 9 Hen. VI. 17, 9; Y. B. 11 Hen. IV. 50, 27; Y. B. 21 Hen. VII. 29, 4. See Y. B. 3 Hen. VI. 43, 20; Y. B. 11 Hen. VI. 9, 18; Y. B. 32 Hen. VI. 12, 20.

To-day, it is true, a traverse of bailment is an immaterial traverse. *Gledstane v. Hewitt*, 1 *Crompt. & J.* 565, *Ames Cas. Pl.* 218, s. c.; *Whitehead v. Harrison*, 6 Q. B. 423. See *Mills v. Graham*, 1 B. & P. N. R. 140.

⁷ 3 *Rot. Parl.* 137 a. In the case of bailment against an executor, however, the action

for whose benefit a bailment was made could have detinue although not owner of the property bailed. Thus, on bailment of a charter by A. to B. to deliver to C., who was not owner of the land, C. recovers by priority of bailment.¹

Finally, we find, as the most striking illustration of the contractual nature of the bailment, the rule of the old Teutonic law that a bailor could not maintain detinue against any one but the bailee. If the bailee bailed or sold the goods, or lost possession of them against his will, the sub-bailee, the purchaser, and even the thief, were secure from attack by the bailor. This doctrine maintained itself with great persistency in Germany and France.² In England the ancient tradition was recognized in the fourteenth century. In 1351 *Thorpe* (a judge three years later) said: "I cannot recover against any one except him to whom the charter was bailed."³ *Belknap* (afterwards Chief Justice) said in 1370: "In the lifetime of the bailee detinue is not given against any one except the bailee, for he is chargeable for life."⁴ Whether it was ever the law of England that the bailor was without remedy, if the bailee died in possession of the chattel, must be left an open question.⁵ Eventually, however, it was agreed that the executor of a bailee was liable in detinue.⁶ But in a case of the year 1323 the plaintiff, who

is at the place of death. Y. B. 3 Hen. VI. 38, 1. BABYNGTON, C. J., said: "Possession is the sole cause of their charge, and the bailment is nothing to the purpose." And COCKAYNE, J., added: "The bailment is nothing to the purpose, for the defendants may make their law."

¹ Y. B. 12 & 13 Ed. III. 244, Ames, Cases on Trusts, 2d ed., 52; Y. B. 19 Hen. VI. 10, 29; Y. B. 19 Hen. VI. 65, 4; Y. B. 19 Hen. VI. 41, 84. But see *contra*, Y. B. 3 Hen. VI. 19, 31; Y. B. 7 Hen. VI. 31, 25; Y. B. 9 Hen. VI. 58, 4.

² Heusler, *Die Gewere*, 487; Carlin, *Niemand kann auf einen Anderen mehr Recht übertragen als er selbst hat*, 42, 48; Jobbé-Duval, *La Revendication des Meubles*, 80, 165.

³ Y. B. 24 Ed. III. f. 41, A, pl. 22.

⁴ Y. B. 43 Ed. III. f. 29, pl. 11.

⁵ In *Sel. Cas. in Ch.*, 10 Seld. Soc'y, No. 116, a plaintiff, before going to Jerusalem, had bailed a coffer containing title deeds and money to his mother. The mother died during his absence, and her husband, the plaintiff's stepfather, refused to give up the coffer to the son on his return. The plaintiff brought his bill in chancery alleging that "because he [stepfather] was not privy or party to the delivery of the coffer to the wife no action was maintainable at common law, to the grievous damage," &c., "if he be not succoured by your most gracious lordship where the common law fails him in this case." See also Y. B. 20 & 21 Ed. I. 189.

⁶ Detinue lies against executor of bailee: Y. B. 16 Ed. II. 490; Y. B. 17 Ed. III. 17, 55 (*semble*); Y. B. 18 Ed. III. 6, 19; Y. B. 22 Ed. III. 9, 37; Y. B. 29 Ed. III. 38 B;

alleged a bailment of a deed to A., and that the deed came to the hands of the defendant after A.'s death, and that defendant refused to deliver on request, failed because he did not make the defendant privy to A. as heir or executor.¹ Afterwards, however,

31 Ed. III. Stath. Det. 4; Y. B. 39 Ed. III. 5 A ("for in detinue one shall be charged by reason of possession as well as because of bailment," by Robert Thirning); Y. B. 41 Ed. III. 30, 35; Y. B. 44 Ed. III. 33, 17; Y. B. 11 Hen. IV. 45, 20 (Y. B. 13 Hen. IV. 12, 2, Y. B. 14 Hen. IV. 23, 30, and 27, 37, s. c.); Y. B. 3 Hen. VI. 38, 1; Y. B. 19 Hen. VI. 10, 29.

Against executrix: Y. B. 39 Ed. III. 17 A (husband joined as defendant).

Against successor of prior: Y. B. 44 Ed. III. 41, 44.

Against widow of bailee: Y. B. 16 Ed. II. 490; Y. B. 41 Ed. II. 30, 35, per *Belknap*, for plaintiff; but *semble* he gave it up, for "le pl' conust l'exception."

But in Y. B. 24 Ed. III. 41 A, 22, *Thorpe* (a judge three years later), admitting that writ of ward might be brought against others than the first "deforceor" adds: "Mes in ceo cas jeo ne puis vers nully recover forsque vs. celly a qui l'escript fuit baille."

In Y. B. 43 Ed. III. 29, 11, *Belknap* said that if a bailee dies, a subsequent possessor, whether executor or not, is liable to the bailor, for mischief that otherwise would exist; but in the lifetime of the bailee detinue is not given against any one, except the bailee, for he is chargeable for life. And *Candish* added that the bailee in his case was dead, and if he could not sue the possessor, he was without remedy; for the detinue was perished, if not good against the possessor.

In Y. B. 29 Ed. III. 38 B, a detinue of chattels vs. A. on bailment to B. where the chattel came into the possession of A., *WILBY, J.*, asked, "How did they come into A.'s possession?" *Wich.* It makes no difference how. *WILBY, J.* It is better for you to say how; it is more formal, and not against you, for manner is not traversable. . . . *Wich.* As executor. . . . *Fynch.* Not named as executor. *Wich.* . . . It is not traversable. *WILBY, J.* (to *Fynch.*) Will you say anything more? *Fynch.* [As before.] *WILBY, J.* Say something else, for he does not sue you as executor, but he shows how goods came to you as executor, to show privity between you and the bailee.

¹ Y. B. 16 Ed. II. 490. Detinue of writing vs. B. on a bailment to D. to redeliver on request and that after death of D. the writing "devynt en la mayn" B.; request, &c. Plea that plaintiff does not show how the writing came to B. "n'il nous fait mye privy a D. come heir, ne come executor." *Schard* relied on "torcinous detinue," admitted defendant was not heir nor executor, but alleged that defendant received *de son tort*. *Alderburch* urged that a count alleging merely that a writing came to the hand of defendant and that he detained it would not be good: so here, where a bailment is put in; for you do not make us privy to the bailee. *BEREFORD, C. J.* You say the writing came to his hand, but say not how. *Schard.* If a stranger takes away charters on the death of the ancestor before the heir gets them, though no bailment is assigned, the stranger is liable in detinue." *Ad quod dicebatur* that he should have trespass. *Negabatur*, for he was never in possession; and *quare vi et armis* lies only when property is taken out of the possession of the plaintiff. *Dicebatur*, the heir has possession at once, though the charter is not in his hand. *MUTFORD, J.* You have not alleged a taking by him in your count, but only that the charter *devynt en sa main*. *HERLE, J.* "Si celui D. fuit ore en pleyne vie et vous ne eussez counte q'il prist l'escript, mes solement qe l'escript devynt en la main celui B. sans lyer lui autrement coment yl avynt, jeo croy qe votre counte ne seroit mye bon, donqe coment qil soit mort, cella ne veot mye charger", per quy del houre

the law changed, and it was good form to count of a bailment to A., and a general *devenerunt ad manus* of the defendant after A.'s death.¹ Belknap's statement also ceased to be law, and detinue was allowed in the lifetime of the bailee against any one in possession of the chattel.² In other words, the transformation in the manner just described, of the bailor's restricted right against the bailee alone, to an unrestricted right against any possessor of the chattel bailed, virtually converted his right *ex contractu* into a right *in rem*.

It is interesting to compare this transformation with the extension at a later period of the right of the *cestuy que trust*. In the early days of uses the *cestuy que use* could not enforce the use against any one but the original feoffee to uses. In 1482 HUSSEY, C. J., said: "When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeofed another in trust, if the latter died seised so that his heir was in by descent, that then no *subpana* would lie."³ Similarly, the husband or wife of the feoffee to uses were not bound by the use.⁴ Nor was there at first any remedy against the grantee of the feoffee to uses although he was a volunteer, or took with notice of the use, because as FROWICKE, C. J., said, "The confidence which the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use,

qe vous ne dedites pas coment il avoyent ne torcenousement ne droiturelment ou il poet estre qe les executors lui bailler' l'escript, issint ne lui chargez vous pas per counte, per quey, &c. *Burton*. Si apres la mort mon pere, ma miere happe mes chartres, jeo useray vers lui tiel breve com ceo, si est unqore ne la puisse mye charger' per privete du bayl, &c." *Ald*. If you had made us privy to D. as wife to husband, your writ were good. *MUTFORD*, J. "Purceo qe vous navez mye dit coment il avynt a les escript, ne vous lui faitez mye prive a D. come heir, ne come executor, ne en autre manere; si agarde la Court qe vous ne preignez rien par votre breve."

¹ Y. B. 29 Ed. III. 38, B, per WILBY, J.; Y. B. 9 Hen. V. f. 14, pl. 22; Y. B. 9 Hen. VI. f. 58, pl. 4. *PASTON*, J. "The count is good enough notwithstanding he does not show how the deed came to defendant, since he has shown a bailment to B. [original bailee] at one time." *MARTIN*, J. "He ought to show how it came to defendant." *PASTON*, J. "No, for it may be defendant found the deed, and if what you say is law, twenty records in this court will be reversed." See *Lib. Int.*, ed. 1510, f. 21.

² Y. B. 11 Hen. IV. f. 46, B, pl. 20; Y. B. 12 Ed. IV. f. 11, pl. 2, and f. 14, pl. 14; Y. B. 10 Hen. VII. f. 7, pl. 14.

³ Y. B. 22 Ed. IV. f. 6, pl. 22. In *Keilw.* 42, pl. 7, *VAVASOUR*, J., said, in 1501, that the subpoena was never allowed against the heir until the time of Henry VI., and that the law on this point was changed by *FORTESCUE*, C. J.

⁴ *Ames*, *Cases on Trusts*, 2d ed., 374, n.

as the law was taken until the time of Henry IV. [VI.?.]"¹ One is struck by the resemblance between this remark of the English judge and the German proverb about bailors: "Where one has put his trust, there must he seek it again."² The limitation of the bailor at common law, and the *cestui que trust* in equity, to an action or suit against the original bailee or trustee, are but two illustrations of one characteristic of primitive law, the inability to create an obligation without the actual agreement of the party to be charged.³

A trust, as every one knows, has been enforceable for centuries against any holder of the title except a purchaser for value without notice. But this exception shows that the *cestui que trust*, unlike the bailor, has not acquired a right *in rem*. This distinction is, of course, due to the fundamental difference between common-law and equity procedure. The common law acts *in rem*. The judgment in detinue is, accordingly, that the plaintiff recover the chattel, or its value. Conceivably the common-law judges might have refused to allow the bailor to recover in detinue against a *bona fide* purchaser, as they did refuse it against a purchaser in market overt. But this would have involved a weighing of ethical considerations altogether foreign to the medieval mode of thought. Practically there was no middle ground between restricting the bailor to an action against his bailee, and giving him a right against any possessor. Equity, on the other hand, acts only *in personam*, never decreeing that a plaintiff recover a *res*, but that the defendant surrender what in justice he cannot keep. A decree against a *mala fide* purchaser or a volunteer is obviously just; but a decree against an innocent purchaser, who has acquired the legal title to the *res*, would be as obviously unjust.

This contract of bailment was a real contract by reason of the delivery of a chattel by the bailor to the bailee. The duty of the bailee was commonly to redeliver the same chattel to the bailor, either upon demand or at some time fixed by the terms of the bail-

¹ Anon., Keilw. 46, pl. 7. See also Ames, Cases on Trusts, 2d ed., 282-285.

² Wo man seinen Glauben gelassen hat, da muss man ihn wieder suchen.

³ This same inability explains the late development of assumpsit upon promises implied in fact, and of *quasi*-contracts. The necessity of the invention of the writ *quare ejecit infra terminum* as a remedy for a termor, who had been ousted by his landlord's vendee, was due to this same primitive conception, for the vendee was not chargeable by the landlord's contract.

ment. But, as has been seen, the chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain detinue against the bailee.¹

Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase-money that as a rule constituted the *quid pro quo* for the seller's duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a *quid pro quo* as payment of purchase-money to support an action of detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer's sealed obligation for the amount of the purchase-money as equivalent to actual payment of money, or livery of a chattel, and accordingly we find in Y. B. 21 Edward III. 12, 2, the following statement by THORPE (Chief Justice of the Common Bench in 30 Edward III.): "If I make you an obligation for £40 for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of debt against me, and I shall be put to my action against you for the thing bought by a writ of detinue of chattels." But it was a radical departure from established traditions to permit a buyer to sue in detinue when there was merely a parol bargain of sale without the delivery of a physical *res* of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older, but there seems to be no earlier expression of it in the books than the following statement by FORTESCUE, C. J.: "If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of debt for the money, and I shall have detinue for the horse on this bargain."² From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported case of *assumpsit*

¹ Y. B. 34 Ed. I. 239; Y. B. 12 & 13 Ed. III. 244; Y. B. 39 Ed. III. 17, A; Y. B. 3 Hen. VI. 43, 20; Y. B. 9 Hen. VI. 38, 13; Y. B. 9 Hen. VI. 60 A, 8; Y. B. 18 Hen. VI. 9 A, 7, and other authorities cited in Ames, *Cases on Trusts*, 2d ed., 52, n. 1.

² Y. B. 20 Hen. VI. 35, 4; Y. B. 21 Hen. VI. 55, 12. See, to the same effect, Y. B. 37 Hen. VI. 8, 18, per PRISOT, C. J.; Y. B. 49 Hen. VI. 18, 23, per CHOKE, J., and Brian; Y. B. 17 Ed. IV. 1, 2. See also Blackburn, *Contract of Sale*, 190-196. But see Y. B. 44 Ed. III. 27, 6.

upon mutual promises.¹ But this would be a misconception. The right of the buyer to maintain detinue, and the corresponding right of the seller to sue in debt, were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants, — each party's grant of a right forming the *quid pro quo* for the corresponding duty of the other.²

In all the cases of detinue thus far considered the action was brought either against a bailee or some subsequent possessor. We have now to consider the extension of detinue to cases where there was no bailment.

The typical case is that of loss, where the loser brings detinue against a finder. Detinue lies where the loser seeks his goods and finds them in the possession of the defendant, and demands them, showing his proof, but is refused.³ This is commonly allowed in cases of estrays⁴ and in cases of loss of charters and other docu-

¹ Peck v. Redman (1555), Dy. 113 appears to be the earliest case of mutual promises.

² If the bargain was for the sale of land and there was no livery of seisin, the buyer had no common-law remedy for the recovery of the land, like that of detinue for chattels. Equity, however, near the beginning of the sixteenth century, supplied the common-law defect by compelling the seller to hold the land to the use of the buyer, if the latter had either paid or agreed to pay the purchase-money. Br. Ab. Feoff. al Use, 54; Barker v. Keate, 1 Freem. 249, 2 Mod. 249, s. c.; Gilbert, Uses, 52; 2 Sand. Uses, 57. The consideration essential to give the buyer the use of land was, therefore, identical with the *quid pro quo* which enabled him to maintain detinue for a chattel. Inasmuch as the consideration for parol uses was thus clearly borrowed from the common-law doctrine of *quid pro quo* it seems in the highest degree improbable that the consideration for an *assumpsit* was borrowed by the common law from equity. 2 Harvard Law Review, 18, 19. But see Salmond, Essays in Jurisprudence, 213.

³ "And albeit that the last possessor acquits himself of the felony, nevertheless if the plaintiff proves that the thing is his as having been stolen, mislaid, or otherwise lost out of his possession, the law wills that he shall recover his thing without being compelled to pay for it." Mirror of Justices, Seld. Soc'y ed., 98. In Lib. Int., ed. 1546, f. 28, A. is summoned to answer C. *de placito quod reddat* a box of charters which he unjustly detains. It is alleged that C. was possessed of the charters, that he casually lost them, that A. afterwards found the charters so that they came *ad manus et possessionem* of A. *per inventionem per quod actio accrevit* to C. to have and demand the charters from A.; but A., though often requested, has not delivered the charters but has refused and still refuses to deliver. For similar precedents see Lib. Int. 84; Lib. Int., ed. 1510, f. 22. Detinue *per inventionem* is allowed in Y. B. 33 Hen. VI. 25, 8; Y. B. 39 Hen. VI. 5, 7; Y. B. 39 Hen. VI. 36, 1; Y. B. 4 Ed. IV. 9, 11; Y. B. 21 Ed. IV. 19, 21; 80, 28; Y. B. 1 Hen. VII. 31, 1; Y. B. 27 Hen. VIII. 13, 35; Y. B. 27 Hen. VIII. 22, 15; Kettle v. Bromsall, Willes, 118. "The finder is liable for his own act." COLPEPPER, J., in Y. B. 14 Hen. IV. 23, 30; 27, 37.

⁴ Y. B. 39 Ed. III. 3, 4, Br. Estray, 4, Fitz. Estray, 3; Y. B. 44 Ed. III. 14, 30, Br. Estray, 1.

ments.¹ In the earlier declarations it was customary to allege generally that plaintiff lost the goods, and they came into the hands of the defendant; but it was afterwards allowed him to allege specifically that the defendant found them.² In a case where this was done³ "Littleton said secretly that this declaration *per inventionem* is a *new found haliday*; for the ancient declaration and entry has always in such a case been generally that the charters *ad manus et possessionem defendentis devenerunt*, and showed how." But the novelty was in the form of the declaration only; there was no new right granted.⁴ From this time detinue *per inventionem* was common, though parties might still declare by *devenire ad manus*.

In some cases one never possessed of the goods might bring the action, as in the case of an heir bringing detinue for a charter.⁵ It has even been said that a grantee may bring an action against the bailee of a grantor.⁶

¹ Y. B. 12 R. II., Fitz. Brefe, 644; Y. B. 11 Hen. IV. 45, 20 ("because defendant came to possession by his own act," Per HANEFORD, J.). In Y. B. 33 Hen. VI. 26, 12, it was objected that the action should be trespass; but *Littleton* replied that here, when he found the charters, it was a lawful act; and although he did not deliver them on request, he should have no action of trespass, only an action of detinue.

² Y. B. 9 Hen. V. 14, 22; Y. B. 7 Hen. VI. 22, 3.

³ Y. B. 33 Hen. VI. 26, 12.

⁴ See per Coke (1 Bulst. 12, 130, *Isack v. Clark*), who says "*per inventionem*" is better than "*devenerunt ad manus*"; but the reporter (Rolle) shows that there is no advantage of one over the other, and that "*devenerunt ad manus*" is commoner. Holmes in his *Common Law* seems to misunderstand the force of *Littleton's* remark.

⁵ Y. B. 20 Ed. I. 213; Y. B. 41 Ed. I. 407.

⁶ Y. B. 9 Hen. VI. 64, 17; *Philips v. Robinson*, 4 Bing. 106 (*semble*).

LECTURE VII.

TROVER.

LEGAL proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day the loser might claim it, and if he produced a sufficient *secta*, or body of witnesses, to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day.¹ There is an interesting case of the year 1234, in which after the estray had been delivered to the claimant upon his making proof and giving pledges, another claimant appeared. It is to be inferred from the report that the second claimant finally won, as he produced the better *secta*.² If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his *res adirata*, or *chose adirrée*, that is, his chattel gone from his hand without his consent;³ or he might bring an appeal of larceny.⁴ According to Bracton, the pursuer of a thief was allowed "*rem suam petere ut adiratam per testimonium proborum hominum*

¹ Sel. Pl. Man. Cts., 2 Seld. Soc'y (1281), 31. "Maud, widow of Reginald of Chalon, has sufficiently proved that a certain sheep (an estray) valued at 8*d.* is hers, and binds herself to restore it or its price in case it shall be demanded from her within year and day; pledges John Ironmonger and John Roberd; and she gives the lord 3*d.* for his custody of it." There is a similar case in the Court Baron, 4 Seld. Soc'y (1324), 144.

² 3 Bract. Note Book, No. 1115.

³ *Adiratus* is doubtless a corruption of *adextratus*, i. e., out of hand. In the precedents of trover and detinue sur trover in Coke's Entries, the plaintiff alleged that he casually lost the chattel "*extra manus et possessionem*." Co. Ent. 38, pl. 31; 40, pl. 32; 169 *d.*, pl. 2.

⁴ "And if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirrée*), in form of trespass, or an appeal of larceny by words of felony." Britt. f. 27. See also Britt. f. 46.

et si consequi rem suam quamvis furatam.”¹ This statement of Bracton, taken by itself, would warrant the belief that the successful plaintiff in the action for a *chose adirrée* had judgment for the recovery of the chattel. This may have been the fact; but it is difficult to believe that such a judgment was given in the popular court. No intimation of such a judgment is to be found in any of the earlier cases. It seems probable that Bracton meant simply that the plaintiff might formally demand his chattel in court as *adiratum*, and, by the defendant's compliance with the demand, recover it. For, in the sentence immediately following, Bracton adds that if the defendant will not comply with his demand, — “si . . . in hoc ei non obtemperaverit,” — the plaintiff may proceed further and charge him as a thief by an appeal of larceny. This change from the one action to the other is illustrated by a case of the year 1233.² The count for a *chose adirrée* is described in an early Year Book.³ The latest recognition of this action that has been found is a precedent in *Novae Narrationes*, f. 65, which is sufficiently interesting to be reproduced here in its original form.

De Chyval Dedit.

Ceo vous monstre W. &c. que lou il avoit un son chival de tiel colour price de taunt, tiel jour an et lieu, la luy fyst cel cheval dedire [adirré], et il ala querant dun lieu en autre, et luy fist demander en monstre fayre & marche et il de son chival ne poet este acerte, ne poet oier tanquam a tiel jour quil vient et trova son cheval en la garde W. de C. que illonques est s. en la gard mesme cesty W. en mesme la ville, et luy dit coment son chival fuit luy aderere et sur ceo amena suffisantz proves de prover le dit chival estre son, devant les baylliefz et les gentes de la ville, & luy pria qui luy fist deliveraunce, et il ceo faire ne voyleit ne uncore voet, a tort et as damages le dit W. de XX. s. Et sil voet dedire &c. [vous avez cy &c. que ent ad suit bon].

¹ Bract. 150 b. See also Fleta, 55, 63.

² 2 Bract. Note Book, No. 824. The plaintiff “dixit quod idem Willelmus in pace dei et Dom. Regis et ballivorum injuste detinuit ei tres porcos qui ei fuerunt addirati, et inde producit sectam quod porci sui fuerunt et ei porcellati et postea addirati.” William disputed the claim, and the plaintiff then charged William as a thief “et parata fuit hoc disracionare versus eum, sicut femina versus latronem, quod legale catallum suum nequiter ei contradixit.”

³ 20 Ed. I. 466. “Note that where a thing belonging to a man is lost (*endire*), he may count that he (the finder) tortiously detains it, etc., and tortiously for this; that whereas he lost (*ly fuit endire*) the said thing on such a day, etc., he (the loser) on such a day,

This count points rather to damages than to the recovery of the horse. It is worthy of note, also, that its place in the "Novae Narrationes" is not with the precedents in detinue, but with those in trespass. There seems to be no evidence of an action of *chose adirrée* in the royal courts. Nor has any instance been found in these courts of detinue by a loser against a finder prior to 1371.¹ In that year a plaintiff brought detinue for an ass, alleging that it had strayed from him to the seigniorship of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender.² Detinue by a loser against a finder would probably have come into use much earlier but for the fact, pointed out in the preceding lecture, that the loser might bring trespass against a finder who refused to restore the chattel on request. Indeed, in 1455,³ where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, PRISOT, C. J., while admitting that a bailor might have detinue against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring detinue, but trespass, if, on demand, the finder refused to give up the goods. Littleton insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said: "This declaration *per inventionem* is a new-found Haliday: for the ancient declaration and entry has always been that the charters *ad manus et possessionem devenerunt* generally without showing how." Littleton was quite right on this point.⁴ But the new fashion persisted, and

etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

¹ In Y. B. 2 Ed. III. f. 2, pl. 5, there is this *dictum* by SCROPE, J.: "If you had found a charter in the way, I should have a recovery against you by *præcipe quod reddat*."

² Y. B. 44 Ed. III. f. 14, pl. 30. See also 13 Rich. II., Bellewe, Det. of Chart. Detinue against husband and wife. Count that they found the charters.

³ Y. B. 33 Hen. VI. f. 26, pl. 12.

⁴ Littleton's remark seems to have been misapprehended in 2 Pollock & Maitland, 174. The innovation was not in allowing detinue where there was no bailment, but in describing the defendant as a finder. The old practice was to allege simply that the goods came to the hands of the defendant, as in Y. B. 3 Hen. VI. f. 19, pl. 31. See also Isaac v. Clark, 1 Bulst. 128, 130. In 1655 it was objected to a count in trover and conversion that no finding was alleged, but only a *devenerunt ad manus*. The objection was overruled. Hudson v. Hudson, Latch, 214.

detinue *sur trover* came to be the common mode of declaring wherever the plaintiff did not found the action upon a bailment to the defendant. In the first edition of "*Liber Intrationum*" (1510), f. 22, there is a count alleging that the plaintiff was possessed of a box of charters; that he casually lost it, so that it came to the hands and possession of the defendant by finding, and that he refused to give it up on request.¹ The close resemblance between this precedent and the earlier one from "*Novae Narrationes*" will have occurred to the learned reader. But there is one difference. In the count for a *chose adirrée* it is the plaintiff who finds the chattel in the defendant's possession. In detinue *sur trover* the finding alleged is by the defendant. And until we have further evidence that the action in the popular courts was for the recovery of the chattel and not for damages only, it seems reasonable to believe that detinue *sur trover* in the king's courts was not borrowed from the action of *chose adirrée*, but was developed independently out of detinue upon a general *devenerunt ad manus*. But whatever question there may be on this point, no one can doubt that detinue *sur trover* was the parent of the modern action of trover.

Add to the precedent in the "*Liber Intrationum*" the single averment that the defendant converted the chattel to his own use, and we have the count in trover.

It remains to consider how the action of trover at first became concurrent with detinue, and then effectually supplanted it until its revival within the last fifty years.

There were certain instances in which detinue, in its enlarged scope, and trespass, did not adequately protect owners of chattels. Neither of these actions would serve, for instance, if a bailee or other possessor misused the goods, whereby their value was diminished, but nevertheless delivered them to the owner on request. The owner's only remedy in such a case was a special action on the case. We find such an action in the reports as early as 1461,² the propriety of the action being taken for granted by both counsel and court.

If, again, after impairing the value of the goods, the bailee or

¹ A similar count in *Lib. Int.* f. 71.

² *Y. B.* 33 Hen. VI. f. 44, pl. 7. See also *Y. B.* 9 Hen. VI. f. 60, pl. 10; *Y. B.* 2 Ed. IV. f. 5, pl. 9, per *Littleton*; *Y. B.* 12 Ed. IV. f. 13, pl. 9; *Rook v. Denny*, 2 Leon. 192, pl. 242.

other possessor refused to deliver them to the owner on request, detinue would of course lie. But the judgment being that the plaintiff recover his goods or their value with damages for the detention,¹ if the defendant saw fit to restore the goods under the judgment, the plaintiff would still have to resort to a separate action on the case in order to recover damages for the injury to the goods. This was pointed out by Catesby in an early case,² and later by Serjeant Moore.³ To prevent this multiplicity of actions, the plaintiff was allowed to bring an action on the case in the first instance, and recover his full damages in one action.

If a bailee destroyed the chattel bailed, the bailor, as we have seen, could recover its value in detinue. But if a possessor other than the owner's bailee destroyed the chattel, if, for instance, the tun of wine which Brown and his "*bons compagnons*" drank up, in the case already mentioned, had come to the hands of Brown in some other way than through bailment by the owner, it is at least doubtful if the owner could have recovered the value of the wine in detinue. Brown, in this case, never agreed with the owner to give up the wine on request. The plaintiff in detinue must therefore show a detention, which would be impossible of goods already destroyed. This was the view of BRIAN, C. J. This conservative judge went so far, indeed, as to deny the owner an action on the case under such circumstances, but on this latter point the other justices were "*in contraria opinione*."⁴

If case would lie against any possessor for misusing goods of another, and also against a possessor other than a bailee for the destruction of the goods, it was inevitable that it should finally be allowed against a bailee who had destroyed the goods. Such an action was brought against the bailee in a case of the year 1479,⁵ which is noteworthy as being the earliest reported case in which a defendant was charged with "converting to his own use" the

¹ See *Williams v. Archer*, 5 C. B. 318, for the form of judgment in detinue.

² Y. B. 18 Ed. IV. f. 23, pl. 5: "If I deliver my clothes to you to keep for me, and you wear them so that they are injured, I shall have an action of detinue, . . . and afterwards an action on the case for the loss sustained by your using the clothes."

³ (1510) Keilw. 160, pl. 2.

⁴ Y. B. 12 Ed. IV. f. 13, pl. 9. See also Y. B. 9 Ed. IV. f. 53, pl. 15, per BILLING, J.

⁵ Y. B. 18 Ed. IV. f. 23, pl. 5.

plaintiff's goods.¹ CHOKE, J., was in favor of the action. BRIAN, C. J., was against it. CHOKE's opinion prevailed.²

Later, a wrongful sale was treated as a conversion. In 1510 the judges said an action on the case would lie against a bailee who sold the goods because "he had misdemeaned himself."³ In a word, trover became concurrent with detinue in all cases of misfeasance.

Trover also became concurrent with trespass. In 1601 the Court of King's Bench decided that trover would lie for a taking.⁴ In the same year the Court of Common Pleas was equally divided on the question, but in 1604, in the same case, it was decided, one judge dissenting, that the plaintiff might have his election to bring trespass or case.⁵ The Exchequer gave a similar decision in 1610.⁶ In 1627, in *Kinaston v. Moore*,⁷ "*semble* per all the Justices and Barons, . . . although he take it as a trespass, yet the other may charge him in an action upon the case in a trover if he will."

In all these cases the original taking was adverse. If, however, the original taking was not adverse, as where one took possession as a finder, a subsequent adverse holding, as by refusing to give up the goods to the owner on request, made the taker, according to the early authorities cited in a preceding lecture,⁸ a trespasser *ab initio*. Trover was allowed against such a finder in 1586, in *Eason v. Newman*,⁹ FENNER, J., citing the opinion of PRISOT, C. J., that the owner could maintain trespass in such a case.

That trover was allowed in *Eason v. Newman* as a substitute for trespass, and not as an alternative of detinue, is evident, when we

¹ The allegation of conversion occurs again in Y. B. 20 Hen. VII. f. 4, pl. 13; Y. B. 20 Hen. VII. f. 8, pl. 18; *Mounteagle v. Worcester* (1556), Dy. 121 a. The earliest precedents using the words "converted to his own use" are in Rastall's Entries, 4 d, pl. 1 (1547). *Ibid.* 8, pl. 1. In the reign of Elizabeth it was common form to count upon a finding and conversion.

² Y. B. 18 Ed. IV. f. 23, pl. 5; Y. B. 27 Hen. VIII. f. 25, pl. 3. "It is my election to bring the one action or the other, *i. e.*, detinue or action on my case at my pleasure."

³ Keilw. 160, pl. 2. To same effect, *Vandrink v. Archer*, 1 Leon. 221, a sale by a finder. The judges thought, however, that an innocent sale would not be conversion. But this *dictum* is overruled by the later authorities. *Consol. Co. v. Curtis*, '92, 1 Q. B. 495; 1 Ames & Smith, Cases on Torts, 328, 333, n. 4.

⁴ *Basset v. Maynard*, 1 Roll. Abr. 105 (M), 5.

⁵ *Bishop v. Montague*, Cro. El. 824, Cro. Jac. 50.

⁶ *Leverson v. Kirk*, 1 Roll. Abr. 105 (M), 10.

⁷ Cro. Car. 89.

⁸ *Supra*, 61-63.

⁹ Goldesb. 152, pl. 79; Cro. El. 495, s. c.

find that for many years after this case trover was not allowed against a bailee who refused to deliver the chattel to the bailor on request. The bailee was never liable in trespass, but in detinue. In 1638, in *Holsworth's Case*,¹ an attempt to charge a bailee in trover for a wrongful detention was unsuccessful, as was a similar attempt nine years later in *Walker's Case*,² "because the defendant came to them by the plaintiff's own livery." A plaintiff failed in a similar case in 1650.³ In the "*Compleat Attorney*,"⁴ published in 1666, we read: "This action (trover) properly lies where the defendant hath found any of the plaintiff's goods and refuseth to deliver them upon demand; or where the defendant comes by the goods by the delivery of any other than the plaintiff." But in 1675, in *Sykes v. Wales*,⁵ WINDHAM, J., said: "And so trover lieth on bare demand and denial against the bailee."

By these decisions trover became concurrent with detinue in all cases, except against a bailee who could not deliver because he had carelessly lost the goods.⁶ Indeed, trover in practice, by reason of its procedural advantages, superseded detinue until the present century.⁷

Although trover had now made the field of detinue and trespass its own, there was yet one more conquest to be made. Trespass, as the learned reader will remember, would not lie, originally, for a wrongful distress, the taking in such a case not being in the nature of a disseisin. In time, however, trespass became concurrent with replevin. History repeats itself in this respect, in the development of trover. In *Dee v. Bacon*,⁸ the defendant pleaded to an action of trover that he took the goods damage feasant. The plea was adjudged bad as being an argumentative denial of the conversion. *Salter v. Butler*⁹ and *Agars v. Lisle*¹⁰ were similar decisions, because, as was said in the last case, "a distress is no conversion." The same doctrine was held a century later in two cases in *Bun-*

¹ Clayt. 57, pl. 99.

² Clayt. 127, pl. 227.

³ *Strafford v. Pell*, Clayt. 151, pl. 276.

⁴ p. 86.

⁵ 3 Keb. 282. See also *Scot and Manby's Case* (1664), 1 Keb. 449, per BRIDGMAN.

⁶ Even here the bailee was chargeable in case, *i. e.*, *assumpsit*.

⁷ In 1833, the defendant in detinue lost his right to defend by *wager of law*, and by the Common Law Procedure Act of 1854, c. 78, the plaintiff gained the right to an order for the specific delivery of the chattel detained. Under the influence of these statutory changes, detinue has regained some of its lost ground.

⁸ Cro. El. 435.

⁹ Noy, 46.

¹⁰ Hutt. 10.

bury. But in 1770, in *Tinkler v. Poole*,¹ these two cases, which simply followed the earlier precedents, were characterized by LORD MANSFIELD as "very loose notes," and ever since that case it has been generally agreed that a wrongful distress is a conversion.²

This last step being taken, trover became theoretically concurrent with all of our four actions, appeal of larceny, trespass, detinue, and replevin, and in practice the common remedy in all cases of asportation or detention of chattels or of their misuse or destruction by a defendant in possession. The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract.

The parallel between trover and assumpsit holds good not only in the success with which they took the place of other common-law actions, but also in their usurpation, in certain cases, of the function of bills in equity. A defendant who has acquired the legal title to the plaintiff's property by fraud or duress is properly described as a constructive trustee for the plaintiff. And yet if the *res* so acquired is money, the plaintiff may have an action of assumpsit for money had and received to his use; and if the *res* is a chattel other than money, the plaintiff is allowed, at least in this country, to sue the defendant in trover.³ In some cases, indeed, an express trustee is chargeable in trover, as where an indorsee for collection refuses to give back the bill or note to the indorser. LORD HARDWICKE, it is true, had grave doubts as to the admissibility of trover in such a case;⁴ but LORD ELDON reluctantly recognized the innovation.⁵ This innovation, it should never be forgotten, was a usurpation. Trover as a substitute for a bill in equity is, and always must be, an anomaly.

¹ 5 Burr. 2657.

² 1 Ames & Smith, Cases on Torts, 274, n. 3.

³ *Thurston v. Blanchard*, 22 Pick. 18; 1 Ames & Smith, Cases on Torts, 287, 288, n. 2.

⁴ *Ex parte Dumas*, 2 Ves. 583.

⁵ *Ex parte Pease*, 19 Ves. 46; "If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."

LECTURE VIII.

DEBT.

THE writ in debt, like writs for the recovery of land, was a *præcipe quod reddat*. The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of a debtor was always for the payment of a definite amount of money or a fixed quantity of chattels.

The ancient conception of a creditor's claim in debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *præcipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in detinue for the recovery of a horse and could prove only the detention of a cow.¹ For the same reasons, debt would not lie for money payable by instalments, until the time of payment of the last instalment had elapsed, the whole amount to be paid being regarded as an entire sum, or single thing.² The obligation might arise either upon a record, a writing, that is, a specialty either mercantile or not; it might arise from a statutory or customary duty; or it might arise from a simple contract with the transfer of a *quid pro quo*. A debtor might as easily owe chattels as money. A

¹ Y. B. 3 Hen. VI. 4, 4; Y. B. 11 Hen. VI. 5, 9; Y. B. 21 Ed. IV. 22, 2; Smith v. Vow, Moore, 298; Bagnall v. Sacheverell, Cro. El. 292; Bladwell v. Stiglin, Dy. 219; Baylis v. Hughes, Cro. Car. 137; Calthrop v. Allen, Hetl. 119; Ramsden's Case, Clayt. 87; Hooper v. Shepard, 2 Stra. 1089; Hulme v. Sanders, 2 Lev. 4. In Vaux v. Mainwaring, Fort. 197, 1 Show. 215, S. C., the distinction was taken that in *indebitatus assumpsit* the plaintiff might recover the amount proved, but in debt the amount stated in the writ or nothing. But afterwards the plaintiff was not held to a proof of the amount stated in the writ even in debt. Aylett v. Lowe, 2 W. Bl. 1221; Walker v. Witter, Doug. 6; M'Quillin v. Cox, 1 H. Bl. 249; Lord v. Houston, 11 East, 62. See also Parker v. Bristol Co., 6 Ex. 706, per Pollock, C. B., and 1 Chitty, Pl., 7th ed., 127-128.

² Rudder v. Price, 1 H. Bl. 547; Hunt's Case, Owen, 42.

debt of chattels would arise from the same *quid pro quo* as a debt of money. A lessee might accordingly be charged in debt for chattels by the lessor,¹ or an employer by his employee;² or a vendor by his vendee.³ As *indebitatus assumpsit* would lie for a debt payable in money, it was also an appropriate remedy for a debt payable in chattels.⁴ The judgment in debt for chattels was like that in detinue, that the plaintiff recover his chattels. The essential distinction between detinue and debt for chattels seems to be this, — detinue was the proper remedy for the recovery of a specific chattel, debt, on the other hand, for the recovery of a specific amount of unascertained chattels. Debt was originally the only remedy for breach of an agreement to deliver a chattel, since no action on the case would lie.⁵

After assumpsit became a concurrent remedy, it became the common remedy; so that to-day it would be a surprise to most lawyers to learn that you could bring debt for the non-performance of a contract to deliver chattels. But one may still bring *indebitatus assumpsit* for a chattel.

The obligation must be for a definite amount. A promise to pay as much as certain goods or services were worth would never support a count in debt.⁶ In Y. B. 12 Ed. IV. 9, 22, BRIAN, C. J., said: "If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of debt against me."⁷ And debt could not be brought for board and lodging furnished, where no price was fixed; the person who furnished the board and lodging would be without legal remedy.⁸ For the same reason, the *quantum meruit* and *quantum valebant* counts seem never to have gained a footing among the common counts in debt,⁹ and in assumpsit the *quan-*

¹ Y. B. 20 & 21 Ed. I. 139; Y. B. 50 Ed. III. 16, 8; Y. B. 34 Hen. VI. 12, 23; Anon., 3 Leon. 260; Denny v. Parnell, 1 Roll. Abr. 591, pl. 1.

² Y. B. 7 Ed. III. 12, 2; Weaver v. Best, Winch, 75.

³ Y. B. 34 Ed. I. 150; Y. B. 20 Hen. VII. 8, 18.

⁴ Cock v. Vivyan, 2 Barnard. 293, 384; Falmouth v. Penrose, 6 B. & C. 385; Mayor v. Clerk, 4 B. & Ald. 268.

⁵ Y. B. 20 Hen. VII. 8, 18.

⁶ Johnson v. Morgan, Cro. El. 758.

⁷ See to the same effect Y. B. 3 Hen. VI. 36, 33; Anon., 2 Show. 183; Mason v. Welland, Skin. 238, 242.

⁸ Young v. Ashburnham, 3 Leon. 161.

⁹ 1 Chitty Pl., 7th ed., 351, 721, gives a precedent of such a count, but says it has been doubted whether it lies. There is no case of it.

tum meruit and *quantum valebant* counts were distinguished from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *indebitatus assumpsit* when no price had been fixed by the parties, the verdict of the jury being treated as equivalent to a determination of the parties at the time of bargain.

It was at one time doubted whether you could recover in debt on a specialty where the precise amount payable was not mentioned in the specialty, though it referred to something by which the amount could be made certain by outside evidence.¹ Afterwards it was held that the plaintiff could recover if the amount could be made definite by extrinsic evidence before the action was brought.² But probably debt could not be brought on a covenant to pay so much as certain goods, services, or anything of the kind should be worth, as was certainly the case with debt on a *quid pro quo*. It was at one time a question whether debt would lie on a bill or note, but it has long been settled that it will.³

As to debt on simple contract it is a rule without exception in modern times that the debt must be founded on a *quid pro quo*. Holmes, in his book on the Common Law,⁴ and in the Law Quarterly Review,⁵ endeavors to show that this requirement was not universal before the reign of Edward III. It is generally agreed that in the early German law only real or formal contracts were valid, and from the time of Edward III. to the introduction of assumpsit debt was the only contractual action not founded on a specialty or a judgment. If, therefore, Holmes is right, there must have been an innovation and then an abolition of it. He has to support him only one case, which is to the effect that a certain mainpennor may charge himself by parol. Now such an obligation was always taken in court, so that it was like a record obligation. To this day you can have a record obligation though it be not in writing. Fleta, writing about twenty years before this, says: "A man is not bound by a promise to pay unless there is a specialty, or it is acknowledged in a court of record."⁶ Twenty-five years later it was established that on a simple contract there can be no

¹ *Johnson v. Morgan*, Cro. Eliz. 758.

² *Anon.*, Style, 31; *Sanders v. Marke*, 3 Lev. 429; *Bloome v. Wilson*, T. Jones, 184.

³ *Cases on Bills and Notes*, Vol. II. p. 873, sec. 4.

⁴ Pp. 260-264.

⁵ Vol. I., pp. 171-174.

⁶ Fleta, Book 2, c. 60, sec. 25.

recovery in debt unless there was a *quid pro quo*. "If a man counts simply upon a grant of a debt, he shall not be received without specialty, but here you have *quid pro quo*."¹

The *quid pro quo* which the debtor must receive to create his duty might consist of anything that the law could regard as a substantial benefit to him. Debts were usually founded upon a loan of money, a sale, a lease of property to the debtor, or upon work and labor performed for him. The *quid pro quo* in all these cases will be examined separately.

An action of debt could be brought by the vendor without any delivery of the property. The title passes without delivery. This doctrine is sometimes thought to be of modern origin, but it is not.² The vendor might bring an action of debt though he was not the owner of the thing sold.³ Even where a finder of goods sold them to the owner in market *overt*, it was a question whether he could not recover; and it was even said that one who sold land could have debt for the land without a feoffment.⁴

The recognition of work and labor as a *quid pro quo* was probably later than that of other forms. In the earlier cases of this sort the objection was made that debt will not lie except on a specialty, but it was decided that the action would lie because there was a *quid pro quo*.⁵

In a case in the Book of Assizes recovery is allowed of a sum of money for giving a woman in marriage.⁶ In later cases the opposite view was expressed;⁷ but it was finally settled that the action lay.⁸

¹ Y. B. 11 & 12 Ed. III. 587. See to the same effect, Y. B. 18 Ed. III. 13, 7; Y. B. 29 Ed. III. 25, 26; Y. B. 44 Ed. III. 21, 23; Y. B. 9 Hen. V. 14, 23; Houtiel's case, 4 Leon. 105 (custom of Bristol).

² Y. B. 21 Ed. III. 12, 2; Y. B. 20 Hen. VI. 35, 4; Y. B. 37 Hen. VI. 8, 18; Y. B. 17 Ed. IV. 1, 2; Y. B. 21 Hen. VII. 6, 4.

³ Y. B. 18 Ed. IV. 5, 30; Y. B. 20 Hen. VI. 6 a, 16; Y. B. 20 Hen. VI. 34, 4.

⁴ Y. B. 7 Ed. IV. 15, 2; Y. B. 22 Hen. VI. 44, 28; Y. B. 37 Hen. VI. 8, 18. If a bargain was for the sale of unascertained chattels, the transaction gave rise to mutual debts, the reciprocal grants of the right to a sum certain of money and a fixed amount of chattels forming the *quid pro quo* for the corresponding debts. Y. B. 21 Hen. VI. 55, 12; Anon., Dy. 30, pl. 301; Slade's Case, 4 Rep. 94 b.

⁵ Y. B. 11 & 12 Ed. III. 587; Y. B. 3 Hen. VI. 42, 13; Y. B. 16 Ed. IV. 10, 3.

⁶ Y. B. 22 Lib. Ass. pl. 70.

⁷ Y. B. 14 Ed. IV. 6, 3; Y. B. 15 Ed. IV. 32, 14; Y. B. 17 Ed. IV. 4, 4; Y. B. 19 Ed. IV. 10, 18; Y. B. 20 Ed. IV. 3, 17.

⁸ Beresford v. Goodrouse, 1 Rolle, 433.

Debt for rent due on a lease for years was originally the only kind allowed. You could not bring debt against a freeholder. This distinction was probably because the leaseholder has no estate in land, and was regarded only as a contracting party. The execution of a release by an obligee to an obligor was also a sufficient *quid pro quo* to create a new debt between the same parties.¹ Forbearance to sue on a claim has been regarded in the same light: "for the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining."²

But debt will not lie upon mutual promises. In *Smith v. Airey*,³ "HOLT, C. J., said that winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an *indebitatus assumpsit* would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet debt would not lie upon that." According to another report of the same case LORD HOLT said, "There is no way in the world to recover money won at play but by special assumpsit."⁴

There would be little chance in the old law for recovery on a quasi-contractual obligation, because most of such obligations are for uncertain amounts, and of course debt would not lie in such a case even on an express agreement. The only case in which debt would lie on a quasi-contract was where the plaintiff parted with his money for a consideration which failed, but of this there are not many traces until rather modern times. As late as in 17 Henry VI.⁵ there seems to have been no remedy at common law. In *Core's Case*⁶ a common-law court does not seem to have given the plaintiff a remedy on a quasi-contract.

By the custom of London and Bristol, debt was allowed upon a

¹ Y. B. 12 Hen. IV. 17, 13.

² *Bidwell v. Catton*, Hob. 216.

³ 2 Ld. Ray. 1034, 6 Mod. 128, Holt, 329, s. c.

⁴ *Walker v. Walker*, Holt, 328, 5 Mod. 13, Comb. 303, s. c. Per HOLT, C. J.: "This is merely a wager and no *indebitatus assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious action for which debt lieth." *Hard's Case*, 1 Salk. 23; *Bovey v. Castleman*, 1 Ld. Ray. 69. Per Curiam: "For mutual promises *assumpsit* may lie, but not *indebitatus assumpsit*." These statements that debt will not lie upon mutual promises bring out with great clearness the distinction already referred to between mutual promises and the mutual duties growing out of a parol bargain and sale. See Pollock, *Contracts in Early English Law*, 6 Harv. Law Rev. 398, 399.

⁵ 1 Calendars in Chancery, 41.

⁶ Dyer, 20 a.

parol grant without *quid pro quo*;¹ and a similar custom prevailed in other local courts.²

Originally there was no *quid pro quo* to create a debt against a defendant if the benefit was conferred upon a third person, although at the defendant's request. Y. B. 9 Hen. V. 14, 23, is a case in point. The plaintiff, having a claim for £10 against T., released the claim upon the defendant's promise to pay him the same amount. The plaintiff failed because the benefit of the release was received by T.³ In Y. B. 27 Hen. VIII. 23, upon similar facts, FITZ-JAMES, C. J., thought the plaintiff should recover in an action on the case upon the promise, but not in debt, "for there is no contract,⁴ nor has the defendant *quid pro quo*." POST, J., and SPELMAN, J., on the other hand, thought there was a *quid pro quo*. It was also made a question, on the same ground, whether a defendant who promised money to the plaintiff if he would marry the defendant's daughter was liable in debt to the plaintiff who married the daughter.⁵ But here, too, the opinion finally prevailed that though the girl got the husband, her father did receive a substantial benefit.⁶ In Y. B. 37 Hen. VI. 9, 18, MOYLE, J., said: "If I say to a surgeon that if he will go to one J. who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the surgeon gives J. the medicines and makes him safe and sound, he shall have a good action [debt] against me for the 100 shillings, and still the thing is to another and not to the defendant himself, and so he has not *quid pro quo*, but the same in effect." This reasoning of MOYLE, J., met with general favor, and it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the

¹ Y. B. 43 Ed. III. 11, 1; Y. B. 14 Hen. IV. 26, 33; Y. B. 22 Ed. IV. 2, 6; F. M. v. R. C., 1 M. & G. 6, n. (a); Y. B. 38 Hen. VI. 29, 12; Y. B. 1 Hen. VII. 22, 12; Williams v. Gibbs, 5 A. & E. 208; Bruce v. Waite, 1 M. & G. 1, and cases cited in Pollock, Cont., 6th ed., 138 n. (p).

² See the cases of parol undertakings in the Bishop of Ely's Court, 4 Seld. Soc'y, 114-118.

³ The true ground of this decision seems sometimes to have been misunderstood. Holmes, Common Law, 267.

⁴ After assumpsit came in, it was many years before it was called a contract. That term was still confined to transactions resting upon a *quid pro quo*. See 2 Harv. Law Rev. 15, and Jenks, Doctrine of Consideration, 134.

⁵ Y. B. 37 Hen. VI. 8, 18; Y. B. 15 Ed. IV. 32, 14; Y. B. 20 Ed. IV. 3, 17; Anon., 1 Vent. 268.

⁶ Appledwaite v. Northby, Cro. EL. 29; Beresford v. Woodroff, 1 Rolle R. 433.

defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff. Accordingly, a father was liable for physic provided for his daughter;¹ a mother for board furnished to her son;² a woman was charged in debt by a tailor for embroidering a gown for her daughter's maid;³ a defendant was liable for instruction given at his request to the children of a stranger, or for marrying a poor virgin.⁴ The common count for money paid by the plaintiff to another at the defendant's request is another familiar illustration of the rule.

But it is an indispensable condition of the defendant's liability in debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the debtor, and one *quid pro quo* cannot give rise to two distinct debts.⁵ Accordingly where the plaintiff declared in debt against A. for money *lent* to B. at A.'s request, his declaration was adjudged bad; for a loan to B. necessarily implied that B. was the debtor. If B. was, in truth, the debtor, the plaintiff should have declared in special assumpsit against A. on the collateral promise. If B. was not the debtor, the count against A. should have been for money *paid* to B. at A.'s request.⁶ By the same reasoning it would be improper to count against A. for goods *sold* to B. at A.'s request. If B. was really the buyer, the seller should charge him in debt, and A. in special assumpsit on the collateral promise. If B. was not the buyer, the count against A. should be for goods *delivered* to B. at A.'s request.⁷ The same distinction holds good as to services ren-

¹ *Stonehouse v. Bodvil*, T. Ray. 67, 1 Keb. 439, s. c.

² *Bret v. J. S.*, Cro. El. 756.

³ *Shandois v. Stinson*, Cro. El. 880.

⁴ *Harris v. Finch*, Al. 6.

⁵ "There cannot be a double debt upon a single loan." *Per Curiam*, in *Marriott v. Lister*, 2 Wils. 141, 142.

⁶ "If it had been an *indebitatus assumpsit* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not the son's; but when the money is lent to the son, 't is his proper debt, and not the father's." *Per Holt, C. J.*, in *Butcher v. Andrews*, Carth. 446 (Salk. 23; Comb. 473, s. c.). See also *Marriott v. Lister*, 2 Wils. 141.

⁷ Y. B. 27 Hen. VIII. 25, 3, per FITZ JAMES, C. J.; *Hinson v. Burrigge*, Moore, 701; *Cogan v. Green*, 1 Roll. Abr. 594; *Anon.*, 1 Vent. 293; *Stonehouse v. Bodvil*, 1 Keb. 439; *Hart v. Langfitt*, 2 Ld. Ray. 841, 842, 7 Mod. 148, s. c.; *Rozet v. Rozet*, 2 Vent. 36, overruling *Kent v. Derby*, 1 Vent. 311, 3 Keb. 756, s. c.

dered to B. at A.'s request. If B. is a debtor, A. is not, but only collaterally liable in *assumpsit*.¹

The distinction between debt and special *assumpsit*, as illustrated in the cases mentioned in the preceding paragraph, is of practical value to-day in determining whether a promise is in certain cases within the Statute of Frauds relating to guaranties. If B. gets the enjoyment of the benefit furnished by the plaintiff at A.'s request, but A. is the only party liable to the plaintiff, A.'s promise is not within the statute. If, on the other hand, B. is liable to the plaintiff for the benefit received, that is, is a debtor, A.'s promise is clearly a guaranty and within the statute.²

Debt lies, of course, against the debtor himself. It was early held that on a simple contract no one was liable on the death of the debtor; the debt was extinguished at law.³ By the custom of London debt would lie against the executor after the death of the debtor;⁴ but this was an exception.

In the reign of Edward IV. an attempt was made to charge the executor of the debtor in chancery. Apparently the attempt was successful.⁵ This was really nothing but a constructive trust, on the doctrine of enrichment.

Later we shall see how the common-law courts gave a remedy by allowing the action of *assumpsit* against the executor. In the case of a specialty originally the heir and only the heir was liable;⁶ and where the heir is named in the bond he has continued liable to this day to the extent of the assets which descend to him.⁷ When

¹ *Alford v. Eglisfield*, Dy. 230, pl. 56; *Baxter v. Read*, Dy. 272, n. (32); *Nelson's Case*, Cro. El. 880 (cited); *Trevilian v. Sands*, Cro. Car. 107, 193, 1 Roll. Abr. 594, pl. 14. A. was the debtor and B. was not liable in *Woodhouse v. Bradford*, 2 Rolle R. 76, Cro. Jac. 520, s. c.; *Hart v. Langfitt*, 2 Ld. Ray. 841, 7 Mod. 148, s. c.; *Jordan v. Tompkins*, 2 Ld. Ray. 982, 6 Mod. 77, s. c.; *Gordon v. Martin*, Fitzg. 302; *Ambrose v. Roe*, Skin. 217, 2 Show. 421, s. c.

² *Watkins v. Perkins*, 1 Ld. Ray. 224; *Buckmyr v. Darnell*, 2 Ld. Ray. 1085, 3 Salk. 15, s. c.; *Jones v. Cooper*, Cowp. 227; *Matson v. Wharam*, 2 T. R. 80.

³ Y. B. 41 Ed. III. 13, 3; Y. B. 2 Hen. IV. 14, 12; *Barry v. Robinson*, 1 B. & P. N. R. 293. The statute of 3 & 4 William IV. alters the law in this respect.

⁴ *Snelling v. Norton*, Cro. El. 409; Y. B. 1 Ed. IV. 6, 13

⁵ 1 Calendar in Chancery, 93. In Y. B. 7 Hen. VII. 12 a, 2, the Chancellor said that if the debtor died, in case of a simple contract debt no action lay against the executor at law, but an action lay in chancery. *Fisher v. Richardson*, Cro. Jac. 47; *Peck v. Loveden*, Cro. El. 804; *Crompton on Courts*, fol. 66 a.

⁶ *Bracton*, fol. 407 b.

⁷ Y. B. 22 Ed. I. 505; Y. B. 22 Ed. I. 615; Y. B. 6 Hen. IV. 4, 2.

the heir was not named in the bond he was supplanted by the executor. There seems to have been a transition period during which suit could be brought against either the heir or the executor. 13 Edward I. ch. 19, recognizes the liability of the executor as existing at that time. While the executor was not liable on simple contracts, yet an exception was made as to rents; both because this savored of the realty, and also because in an action of debt for rent the testator could not have waged his law any more than he could in the case of a specialty.

If a man died intestate as early as 13 Edward I., the ordinary was chargeable with the payments of his debts to the extent of the assets coming to him. By 31 Edward I. ch. 11, the ordinary could appoint a deputy to act for him, and this deputy is the original of the administrator of an intestate.

LECTURE IX.

COVENANT.

IN the ancient Germanic law all contracts were formal contracts. The history of the contractual obligation appears to be as follows:

When a wrongdoer had committed a wrong upon another, the wrong gave rise to the blood-feud, which could be satisfied only by a pecuniary compensation; but if the wrongdoer was unable to pay the pecuniary compensation he was allowed to furnish a hostage. The hostage was a person who in default of payment of the debt became a slave of the creditor. Later it became the duty of the hostage to pay the debt if the debtor did not do so; that is, he became a surety for the debt.

A part of the formal ceremony by which this obligation of the surety was established was the handing of a spear to the creditor, in token that the hostage was in the power of the creditor. Afterwards a straw (*festuca*) took the place of the spear. The creditor handed the straw to the surety, which gave him the power to go against the debtor.

By this transaction the creditor had a right to payment of the debt, not by the debtor, but by the surety; and the surety only had a right against the debtor. The remedy was by distress upon the property of the party bound.

Where the debtor could neither pay nor produce a surety, he was finally allowed to furnish himself as a surety. He took the *festuca* in his left hand, transferred it into his right hand, and gave it to the creditor. At about the same time the right was given to the creditor not only of distraining, but also of treating the debtor as personally liable to pay.

With this step we have a complete formal obligation. Other things came to be used in place of the straw, such as a glove or ring; the engagement ring is a survival of this practice. The name *wadia* (pledge) was given to the article so presented.

When the Germans became familiar with Roman civilization it was natural to put the terms of the agreement into a written document, which was passed to the creditor along with the *wadia*; and in time the *wadia* itself was omitted. This document, adding the requirement of a seal to make it formal, is the English covenant.

The earliest covenants we find in the books seem to touch the land.¹ The earliest instance of a covenant not relating to land is of the time of Edward III.² The earliest covenants were regarded as grants, and suit could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the money, and executed itself. For failure to pay the money, debt would lie.³ Afterwards an action of covenant was allowed, so that to-day there is an option.

A seal was always essential. It was considered, formerly, of much greater importance than now. Glanvill says that if the defendant admits that a seal upon the instrument is his seal, but denies the execution of the instrument, he is, nevertheless, bound, for he must set it down to his own carelessness that he could not keep his seal. The case supposed would arise where the seal had been lost or stolen. There is a case to this effect in the time of John.⁴ The doctrine was somewhat qualified by the time of Bracton.⁵ He seems to think that a covenantor would not be liable unless it was by his negligence that the matter occurred, as by leaving the seal in the possession of his bailiff or his wife.⁶ In the time of Edward I.⁷ is a case on the same principle, being a petition to the King that a certain seal that had been lost should no longer have validity. In Riley's Memorial of London⁸ it is said that public cry was made that A. had lost his seal and that he would no longer be bound by the same. Riley⁹ also gives an account of making a new seal for the city of London, and it is stated, as if it was important, that the old seal was broken with due formality. Of course this doctrine has left no trace in modern times. For cen-

¹ Y. B. 20 & 21 Ed. I. 494, 496.

² Y. B. 4 Ed. III. 57, 71; Y. B. 7 Ed. III. 65, 67.

³ Chawner v. Bowes, Godb. 217.

⁴ Abb. pl. 55, col. 2, R. 4 (8 John).

⁵ Bract. 396 b.

⁶ This is the doctrine of the well-known case on bills and notes of Young v. Grote.

⁷ Abb. pl. 284, col. 2, R. 7 (19 Ed. I.).

⁸ Page 45 (29 Ed. I.).

⁹ Page 447 (4 Rich. II.).

turies a covenantor has not generally used a distinctive seal; any kind of impression has been sufficient.

In the case of the death of the obligee the heir and he only could sue.¹ A century later it was agreed² that the heir should not sue. In the time of Edward I.³ is the earliest case when an executor sued. In 47 Edward III. it was said that the executor could sue even though not named in the bond, and from that time the point has been settled. The heir was not allowed to sue unless the bond ran to the obligee and the heirs of the obligee, and in general it seems that the bond ran to persons named.

If it ran to A. only, A. could sue. For another illustration take the case of an annuity or rent charge. The right is enforced according to the words of the document. If the grantor bound himself personally there was a writ of annuity; if not, there was only a remedy against the man by distress. Now this personal right might be given to A., to A. and his heirs, to his heirs and assigns, and in each case only those named could sue.⁴

In this country, formerly in New York, and I believe still in Pennsylvania, where persons make an absolute conveyance, the grantee agreeing to pay a certain sum for ever, the covenant runs to the heirs and assigns and may be sued on by the assigns. It is the same thing as a rent charge, except that the rent charge is granted by the owner of the land. This covenant is made by the vendee of the land in consideration of the conveyance of the land.⁵

Ordinarily an annuity issues from real estate, but this is not indispensable. If an annuity is granted to A. and his heirs issuing out of his personalty, the heirs would be entitled to it and not his executors. This would seem to be a survival of the old rule that the heir is entitled simply because he is named as obligee.⁶

A covenant of warranty is interesting in the same way. Orig-

¹ Bract. 407 b; Y. B. 20 Ed. I. 181; *ibid.* 255, 279; Y. B. 22 Ed. I. 515, 517; Y. B. 13 Ed. III. 169; *ibid.* 345; Y. B. 14 Ed. III. 3; Y. B. 25 Ed. III. 48; Y. B. 49 Lib. Ass. 317 a, 4; Fitzh. Debt, 135, 141, 165.

² Y. B. 19 Hen. VI. 41, 84.

³ Y. B. 21 Ed. I. 375.

⁴ Britt. fol. 106; and Coke's Law Tracts, 322, give some descriptions of this. Perkins Conveyancing, sec. 101; Baker v. Broke, Moore, 5; s. c. Dyer, 65; Anon., Owen, 3; Maund's Case, 7 Coke's Rep. 28 b; Co. Litt. 144; Hargrave's note, 236.

⁵ Van Rensselaer v. Read, 26 N. Y. 558; Streaper v. Fisher, 1 Rawle, 155.

⁶ Bishop v. Church, 2 Vesey, Sen. 100, 107; Radburn v. Jervis, 3 Beavan, 450; Aubin v. Daly, 4 B. & Ald. 59.

inally before they had charters of warranty, I have no doubt that it was implied that where a man granted land he was under an obligation to warrant the title to his immediate grantee. Now suppose a grant by A. to B. who grants to C. who is evicted. C. can resort to B. and B. can resort to A. and to the heirs of A., and the heirs of A. and B. would be responsible. But suppose when C. is turned out, B. is dead without heirs. Here C. has no remedy. As soon as covenants of warranty were introduced there was no difficulty if A. made his covenant broad enough to cover the heirs and assigns of B.; *i. e.*, if A. made a covenant of warranty to B., his heirs and assigns, and B. conveyed to C., C. as assignee of B. could sue A. Bracton¹ tells the different ways in which a warranty may be expressed, giving the different forms of a warranty to A. and his heirs, in which case the grantor is not liable to the assigns of the grantee immediately, but only mediately. The fullest warranty is to A. and his heirs and assigns, and the heirs and assigns of the assigns.²

My opinion on this subject is different from that expressed in Holmes's Common Law,³ and I think the passage there cited from Bracton must be an error in the text. Coke in his First Institute⁴ gives references to show that a warranty to A. and his heirs and assigns covered everybody; but the word "assigns" was necessary, and, in the time of Bracton, to include every one, as we have seen, an even wider form of expression was necessary. An interesting question is whether any analogy may be found on the position of the drawer of a bill of exchange and the successive indorsers.

I shall treat of warranty and covenants for warranty indiscriminately. A mesne warrantor may sue any prior warrantor after he has paid the subsequent warrantee.⁵ But no intermediate warrantor can thus sue until he has so discharged his obligation.⁶ In this last case Ruffin compares the covenants of warranty to a bill or note. If an intermediate grantor should convey without warranty, he could never sue the antecedent parties. He would be like an in-

¹ 1 Tw. Bract. 294, fol. 37 b.

² 6 Tw. Bract. 10, 86, 78.

³ P. 371.

⁴ Co. Lit. 384 b, notes (r) and (s).

⁵ Jones v. Whitsett, 79 Mo. 188; Garlock v. Closs, 5 Cow. 143; Thompson v. Shattuck, 2 Met. 615, 618.

⁶ Booth v. Starr, 1 Conn. 244; Wheeler v. Sohler, 3 Cush. 219; Markland v. Crump, 1 Dev. & Bat. 94.

dorser without recourse.¹ The assignee, like the holder of a bill, may sue any or all of the prior warrantors.²

A purchaser for value without notice takes the warranty free from equity. That is, if the grantor has conveyed with warranty and the purchaser gets title free and clear, he gets the warranty free and clear.³ On principle a release by an intermediate grantee after he had conveyed to an assignee must be inoperative. He has no longer any right to control the covenant.⁴ The same point was decided in the case of a covenant running with the reversion.⁵ On the other hand, a release made by a grantor at the time he is still the owner of the land is effective, and any subsequent grantee will be prevented by it from going upon the original grantor.⁶ Some of the covenants, such as that one has a good title, are broken as soon as they are made if at all, and a question might be made whether one who had taken by assignment could sue in his own name or must bring his action in the name of the assignor, the argument being that as soon as the covenant is broken it is a mere chose in action. The case of *Spoor v. Green*⁷ gives the English rule that the assignee can sue in his own name. In this country the rule is the other way.⁸ The English rule is the better, and is to be compared with the case of the assignee to an overdue bill. Finally, a stranger may guarantee the title. This corresponds to an *aval*.⁹

A release of one would warrant or would operate as a release of all intermediate warrantors. On what principle is it that the ultimate assignee is permitted to sue the original grantor? I cannot believe that the assignee sues as assignee of a contract that is never

¹ *Keith v. Day*, 15 Vt. 660; approved in *Smith v. Perry*, 26 Vt. 279.

² *Wilson v. Taylor*, 9 Ohio St. 595; *Thompson v. Shattuck*, 2 Met. 615, 618.

³ *Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Kellogg v. Wood*, 4 Paige, 578, 616; *Suydam v. Jones*, 10 Wend. 180; *Greenvault v. Davis*, 4 Hill, 643; *Hunt v. Orwig*, 17 B. Monroe, 73; *Alexander v. Schreiber*, 13 Mo. 271, *accord*; *Martin v. Gordon*, 24 Ga. 533; *Gavin v. Buckles*, 41 Ind. 528, *contra*.

⁴ *Chase v. Weston*, 12 N. H. 413; *Littlefield v. Getchell*, 32 Me. 390, *semble*.

⁵ *Harper v. Bird*, T. Jones, 102. In *Middlemore v. Goodale*, Cro. Car. 503, is a dictum to the contrary, but it must be considered wrong.

⁶ *Field v. Snell*, 4 Cush. 504; *Littlefield v. Getchell*, 32 Me. 390.

⁷ L. R. 9 Exch. 99, 116-120.

⁸ *Rawle*, Covenants, 4th ed., 318, 319, 5th ed., § 205; *Greenby v. Kellogg*, 2 Johns. 1; *Ladd v. Noyes*, 137 Mass. 151.

⁹ *Allen v. Culver*, 3 Denio, 284, 301; 1 *Smith's Lead. Cases*, 7th ed., 152, criticizes this case.

formally assigned. Frequently the assignors each keep their deeds in their own possession, so there is no necessary transfer of documents. The assignee of the land takes the warranty with the land, and I believe that the warranty runs to the assignee of the land as such, and that any one who is an assignee of the land can sue. He sues not as a successor, but because he comes within the terms of the original obligation.

It is absolutely essential to bring one within the words of a promise, but not to show that he is the grantee of the land. It is enough to show that he has whatever interest was conveyed. Thus if A. makes a deed of land which he does not own to B., and B. to C., C. gets no title, but he can enforce the warranty against A.¹ The law that a covenant could be sued on by an assignee was very ancient.²

I believe also that covenants ran with the reversion at common law, though here the authority is not so clear.³ These instances which I have given relate to realty. I have been able to find no instance of a covenant to pay money being made to A. and assigns. The old obligations were: 1. Bill single; 2. Bond with a condition; 3. A statute staple; 4. A statute merchant. All these were bonds, the first being without a condition, the third being acknowledged before the staple, the fourth before the court. The form of these was that the person acknowledged himself to be indebted, and it may perhaps be conceived to be impossible, being an acknowledgment of indebtedness to one particular person, that it could be an acknowledgment to any one else.

There is one curious case decided in the 33d year of Charles II.⁴ It was a case of covenant to pay money to the bearer. It was objected that there was no certain payee, but the court said the person seemed sufficiently described at the time the covenant was made.

¹ *Cuthbertson v. Irving*, 4 H. & N. 742; 6 H. & N. 135; *Rawle on Covenants*, 4th ed., 362, 374, 5th ed., §§ 232, 236.

² *Fitzh. Abr. Covenants*, 30; *Y. B. 21 Ed. I.* 137; *Natura Brevium* (French folio ed.) fol. 49 b; *Fitzh. Nat. Brev. fol.* 145; *Fitzh. Abr. Cov.* 28, 25; *Baylye v. Hughes*, *Cro. Car.* 137. These cases show pretty clearly that covenants did run with the land at common law, which has been made a question.

³ *Harper v. Burgh*, 2 Lev. 206; *Glover v. Cope*, 3 Lev. 326; *Vyvyan v. Arthur*, 1 B. & C. 410, 414, *accord*; *Thrale v. Cornwall*, 1 Wilson, 165; *Barker v. Damer*, 3 Mod. 337, *semble, contra*.

⁴ *Shelden v. Hentley*, 2 Show. 160.

Delivery makes the charter speak, and by the delivery he expounds the person meant. This is of course not law to-day. You cannot make an instrument under seal to bearer. The point I wish to bring out is that when you have got such an instrument the rights of the person would be the same as in a covenant relating to land.

LECTURE X.

SPECIALTY CONTRACTS AND EQUITABLE DEFENSES.

It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton: "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere."¹

Bracton's statement is confirmed by a decision about a century later. The action was debt upon a covenant to pay £100 to the plaintiff upon the latter's marrying the defendant's daughter. It was objected that this being a debt upon a covenant touching marriage was within the jurisdiction of the spiritual court. But the common-law judges, while conceding the exclusive jurisdiction of the spiritual court if the promise had been by parol, gave judgment for the plaintiff, because this action was founded wholly upon the deed.² In another case it is said: "In debt upon a contract the plaintiff shall show in his count for what consideration (*cause*) the defendant became his debtor. Otherwise in debt upon a specialty (*obligation*), for the specialty is the contract in itself."³

The specialty being the contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. And such was the law. "If one loses his obligation, he loses his duty."⁴ "Where the action is upon a

¹ Brac. 100 b.

² Y. B. 45 Ed. III. 24, 30. To the same effect, Fitz. Ab. Dett. 166 (19 Rich. II.).

³ Bellewe (ed. 1569), 111 (8 Rich. II.).

⁴ Y. B. 27 Hen. VI. 9, 1, per DANBY.

specialty, if the specialty is lost, the whole action is lost.”¹ The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, which, in the seventeenth century, upon the obligee’s affidavit of the loss or destruction of the instrument, compelled the obligor to perform his moral duty.² A century later the common-law judges, not to be outdone by the chancellors, decided, by an act of judicial legislation, that if profert of a specialty was impossible by reason of its loss or destruction, the plaintiff might recover, nevertheless, upon secondary evidence of its contents.³

The difference between the ethical attitude of equity and the unmoral (not immoral) attitude of the common law in dealing with specialty contracts appears most conspicuously in the treatment of defenses founded upon the conduct of the obligee. As the obligee, who could not produce the specialty, was powerless at common law against an obligor, who unconscionably refused to fulfil his promise, so the obligor who had formally executed the instrument was, at common law, helpless against an obligee who had

¹ Y. B. 24 Ed. III. 24, 1, per SHARDELOWE, with the approval of STONORE, C. J., and WILUGHBY, J. To the same effect, Y. B. 3 Ed. III. 31 b, 1; Y. B. 4 Hen. IV. 17, 14; Y. B. 4 Hen. VI. 17, 1; Y. B. 19 Hen. VI. 6, 11.

² Equity seems to have proceeded rather cautiously in giving relief in the case of lost obligations. In 1579 an obligee obtained a decree against an obligor who had wrongfully obtained the specialty. *Charnock v. Charnock*, Tothill, 267. See also *King v. Hundon* (1615), Hob. 109; *Barry v. Style* (1625), Latch, 24; *Abdee’s Case*, (1625), Latch, 146. In 1625, in *Anon.*, Poph. 205, Latch, 148, s. c., *DODERIDGE, J.*, said: “The grantee of the rent-charge, having now lost his deed, can have no remedy in equity, for in this case *equitas sequitur legem*.” *JONES, J.*, and *WHITLOCK, J.*, were of the same opinion; *DODERIDGE, J.*, then added: “If the grantee had lost the deed by a casual loss, as by fire, &c., in such a case he shall have remedy in equity.” See to the same effect, *Barry v. Style*, Latch, 24, per *JONES, J.*; *Abdee’s Case*, Latch, 146; *Miller v. Reames*, 3 Sw. 281, n.; 1 Roll. Abr. 375, pl. 1. The earliest reported cases of equitable relief upon lost specialties belong to the last half of the seventeenth century. *Underwood v. Staney*, 1 Ch. Cas. 77; *Collet v. Jaques*, 1 Ch. Cas. 120; *Anon.*, 1 Ch. Cas. 270; *Lightlove v. Weeden*, 1 Eq. Ab. 24, pl. 7; *Sheffield v. Castleton*, 1 Eq. Ab. 93, pl. 6.

³ *Read v. Brookman*, 3 T. R. 151. This case was wholly without precedent at common law, was opposed to the opinion of Lord HARDWICKE as expressed in *Atkins v. Farr*, 2 Eq. Ab. 247; *Walmesley v. Child*, 1 Ves. 341, 345; and *Whitfield v. Fausset*, 1 Ves. 387, 392; and did not commend itself to Lord ELDON in *Ex parte Greenway*, 6 Ves. 811, 812; *Princess of Wales v. Liverpool*, 1 Sw. 114, 119.

the specialty, no matter how reprehensible his conduct in seeking to enforce it. On the other hand, as equity enabled the owner of a lost obligation to enforce it against an unjust obligor, so also would the Chancellor furnish the obligor with a defense by enjoining the action of the obligee, whenever it was plainly unjust for him to insist upon his strict legal right.

Let us examine the usual defenses in the light of the authorities.

Fraud. — Startling as the proposition may appear, it is nevertheless true that fraud was no defense to an action at law upon a sealed contract. In 1835, in *Mason v. Ditchbourne*,¹ the defendant urged as a defense to an action upon a bond, that it had been obtained from him by fraudulent representations as to the nature of certain property; but the defense was not allowed. LORD ABINGER said: "The old books tell us that the plea of fraud and covin is a kind of special *non est factum*, and it ends 'and so the defendant says it is not his deed.' Such a plea would, I admit let in evidence of any fraud in the execution of the instrument declared upon: as if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defense is unavailing, when once it is shown that the party knew perfectly well the nature of the deed which he was executing." This case was followed in 1861 in *Wright v. Campbell*,² BYLES, J., remarking: "Surely, though you shewed the transaction out of which it arose to have been fraudulent, yet in an action at law, on the deed, that would not be available as a legal defense."

Under the Common-Law Procedure Act of 1854, § 83, fraud was pleadable in such cases as an equitable plea; for, from very early times, equity would grant a permanent unconditional injunction against an action upon a specialty got by fraud.³

In the United States there are numerous decisions disallowing the defense of fraud in an action at law upon a specialty.⁴ This

¹ 1 M. & Rob. 460, 2 C. M. & R. 720, n. (a), s. c.

² 2 F. & F. 393. See also *Bignold v. Bignold*, 1 Mad. Ch. Pr., 3d ed., 383; *Spencer v. Handley*, 4 M. & Gr. 414, 419.

³ *Savill v. Wolfall* (1584), Ch. Cas. Ch. 174, 175; *Glanvill v. Jennings*, Nels. Ch. 129; *Lovell v. Hicks*, 2 Y. & C. Ex. 46.

⁴ *Hartshorn v. Day*, 19 How. 211, 222; *George v. Tate*, 102 U. S. 564; *Shampeon v.*

is still the rule in the Federal courts, and was applied in 1894.¹ But nearly all, if not all, of the State decisions just cited, have lost their force by reason of statutory changes, so that the obligor is no longer required to resort to equity for relief. In a few States, chiefly in those where there was, in the early days, no Court of Chancery, the defense of fraud was allowed to a specialty obligor without the aid of a statute.²

Illegality. — If the illegality of a contract under seal appeared on the face of the instrument, no court would sanction the obvious scandal of a judgment in favor of the obligee.³ But if the specialty was irreproachable according to its tenor, the common law, prior to 1767, did not permit the obligor to defeat the obligee by showing that the instrument was in fact given for an illegal or immoral purpose.⁴ The only remedy of the obligor was a bill in equity for an injunction against the action at law. Such bills were very common.⁵ As late as 1735⁶ the court of equity gave relief in favor of the obligor of an illegal bond, and the Chancellor says that "it

Connecticut Co., 42 Fed. R. 760; *Vandervelden v. Chicago Co.*, 61 Fed. R. 54; *Kennedy v. Kennedy*, 2 Ala. 571, 592; *Halley v. Younge*, 27 Ala. 203; *White v. Watkins*, 23 Ill. 480, 482, 483; *Gage v. Lewis*, 68 Ill. 604, 613; *Huston v. Williams*, 3 Blackf. 170; *Scott v. Perrin*, 4 Bibb, 360; *Montgomery v. Tipton*, 1 Mo. 446; *Burrows v. Alter*, 7 Mo. 424; *Rogers v. Colt*, 1 Zab. 704; *Stryker v. Vanderbilt*, 1 Dutch. 482 (see also *Connor v. Dundee Works*, 50 N. J. 257, 46 N. J. Eq. 576); *Vrooman v. Phelps*, 2 Johns. 177; *Dorr v. Munsell*, 13 Johns. 430; *Franchot v. Leach*, 5 Cow. 506; *Champion v. White*, 5 Cow. 509; *Dale v. Roosevelt*, 9 Cow. 307; *Belden v. Davies*, 2 Hall, 433; *Guy v. McLean*, 1 Dev. 46; *Greathouse v. Dunlap* (Ohio), 3 McL. 302, 306; *Wyche v. Macklin*, 2 Rand. 426.

¹ *Vandervelden v. Chicago Co.*, 61 Fed. R. 54.

² *Union Bank v. Ridgely*, 1 Har. & G. 324, 416; *Edelin v. Sanders*, 8 Md. 118, 131; *Dorsey v. Monnett* (Md.), 1890, 20 Atl. R. 196; *Partridge v. Messer*, 14 Gray, 180; *Milliken v. Thorndike*, 103 Mass. 382; *Stubb v. King*, 14 S. & R. 206, 208; *McCulloch v. McKee*, 16 Pa. 289; *Phillips v. Potter*, 7 R. I. 289; *Gray v. Hankinson*, 1 Bay, 278; *Means v. Brickett*, 2 Hill, Ch. 657.

³ *Y. B. 2 Hen. IV. 9, 44*; *Thompson v. Harvey*, Comb. 121; *Taylor v. Clarke*, 2 Show. 345; *Norfolk v. Elliott*, 1 Lev. 209, Hard. 464, s. c.

⁴ *Macrowe's Case* (1585), Godb. 29, pl. 38; *Brook v. King* (1588), 1 Leon. 73; *Jones's Case*, 1 Leon. 203; *Oldbury v. Gregory* (1598), Moore, 564 (*semble*); *Jenk. Cent. Cas.* 108. See also *Andrews v. Eaton* (1729), Fitzg. 73.

⁵ *Tothill*, ed. 1649, 26, 26, 27, 27; *Tothill*, ed. 1671, 27, 81, 84, 86; 1 Vern. 348, 411, 412, 475; 2 Vern. 70, 291, 652, 764; *Blackwell v. Redman*, 1 Ch. Rep. 88; *Hall v. Potter*, 3 Lev. 411; *Kemp v. Coleman*, 1 Salk. 156; *Rawden v. Shadwell*, Amb. 269; *Newman v. Franco*, 2 Anst. 519; *Andrew v. Berry*, 3 Anst. 634; *Harrington v. Duchatel*, 1 Bro. C. C. 124.

⁶ *Law v. Law*, Cas. t. Talbot, 140, 3 P. Wms. 391.

is agreed on all hands that the bond is good at law." Even in 1765¹ the old rule was enforced.

But the common-law rule was changed in 1767 by *Collins v. Blantern*,² which sanctioned the *legal* defense of illegality. The opinion of the court delivered by WILMOT, C. J., bears the unmistakable signs of an innovation. "We are all of opinion that the bond is void *ab initio* by the common law, by the civil law, moral law, and all law whatever." And yet the learned judge was unable to cite a single authority. "I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem.*" This decision, being before the Revolution, was naturally followed in this country.

Failure of Consideration. — As fraud and illegality were not legal defenses to an action upon a specialty, no one will be surprised to find that the rule was the same as to failure of consideration. The doctrine is explicitly stated by Bracton: "*Nec habebit exceptionem pecunie non numerate contra scripturam.*"³ A case of the time of Henry VI.⁴ illustrates pointedly the purely equitable nature of the obligor's relief, and also the possibly limited scope of that relief. The obligor, being sued at law, applied to the Chancellor for relief, on the ground that he had not received any part of the expected equivalent for which he had executed his bond. The Chancellor consulted the judges of both Benches, who were all of opinion, that in conscience the obligee ought to surrender the bond or execute a release. The Chancellor made a decree accordingly against the obligee.⁵ The latter, however, refused to give up the bond or to release it, and was thereupon committed to the Fleet for contempt. He persisted however, although in prison, in the prosecution of his action at law, and the same judges of the Common Bench, who had advised the Chancellor to make his decree against the obligee, now gave judgment at law in his favor. The judges were clearly right both as to their advice and their subsequent judgment. Equity acts *in personam*, not *in rem*. The Chancellor could imprison the obligee for disobedience of his decree, but he could not nullify the bond. After 1854 obligors could

¹ *Downing v. Chapman*, 9 East, 414, n. (e).

² 2 Wils. 341, 1 Sm. L. C. 154.

³ Bract. 100 b.

⁴ Y. B. 37 Hen. VI. 13, 3.

⁵ See also *Savell v. Romsden* (Ed. VI.), 1 Cal. Cl. cxxi; *Tourville v. Naish*, 3 P. Wms. 307.

make use of the statutory equitable plea of failure of consideration, which was an absolute bar to the action.

The English rule against the admissibility of failure of consideration as a defense at law was followed in this country in a number of early decisions;¹ but, by statute, these decisions no longer govern except in the Federal courts.²

Payment. — How completely ethical considerations were ignored by the common-law judges in dealing with formal contracts, is shown by the numerous cases deciding that a covenantor who had paid the full amount due, but without taking a release, must, nevertheless, pay a second time, if the obligee was unconscionable enough to bring an action on the specialty.³ Nay, more, even though the specialty was upon payment surrendered to the obligor, the latter was still not safe unless he cancelled or destroyed the specialty. For, if the obligee should afterwards get possession of the instrument, even by a trespass, the obligor, notwithstanding the payment, the surrender, and the trespass, would have no defense to an action at law by the obligee, "because of the mischief that would befall the plaintiff if one should be received to avoid an obligation by such averment by bare words, and also because there is no mischief to the defendant if his plea be true, since he may have a writ of tres-

¹ *Hartshorn v. Day*, 19 How. 211, 222; *Leonard v. Bates*, 1 Blackf. 172; *Huston v. Williams*, 3 Blackf. 170, 171; *Fitzgerald v. Smith*, 1 Ind. 310, 313; *Bates v. Hinton*, 4 Mo. 78; *Hoitt v. Holcomb*, 23 N. H. 535, 554; *Doolan v. Sammis*, 2 Johns. 179, n.; *Dorr v. Munsell*, 13 Johns. 430; *Parker v. Parmele*, 20 Johns. 130. The opposite rule was adopted in South Carolina, *Gray v. Handkinson*, 1 Bay, 278; *Adams v. Wylie*, 1 N. & McC. 78; *Tunno v. Fludd*, 1 McC. 121; and in Pennsylvania, *McCulloch v. McKee*, 16 Pa. 289.

² The framers of the New York statute, 2 Rev. St. 406, § 77, seem not to have discriminated between the failure of an expected consideration, and the absence of a consideration where none was intended. By making the seal "only presumptive evidence of a sufficient consideration which may be rebutted," they not only let in an equitable defense at law, but also abolished gratuitous sealed obligations altogether.

³ "And although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact." Dy. 51, pl. 15. See to the same effect, *Anon.* (1200), 2 Rot. Cur. Reg. 207; Y. B. 20 & 21 Ed. I. 305; Y. B. 5 Ed. III. 63, 106; Y. B. 20 Hen. VI. 28, 21; Y. B. 22 Ed. IV. 51, 8; *Anon.* (1537), Dy. 25, pl. 60; *Nichol's Case* (1565), 5 Rep. 43, Cro. El. 455, s. c.; *Kettleby v. Hales* (1684), 3 Lev. 119; *Mitchell v. Hawley*, 4 Den. 414, 418, and the cases cited in the next note.

pass for the carrying off of the obligation, and recover damages for the loss sustained in this action."¹

As in the case of fraud and illegality, so in the case of payment, equity at length gave relief to the obligor by restraining actions at law. In 1483, Chancellor Rotheram asked the advice of the judges as to the propriety of issuing an injunction against the recognizee in a statute-merchant which had been paid by the recognizer. The judges were opposed to the injunction, HUSSEY, C. J., saying: "It is less of an evil to make obligors pay a second time for their negligence than to disprove matter of record or specialty by two witnesses." The Chancellor remarked that it was the common course in Chancery to grant a subpoena in the case of a specialty. In the end, however, in deference to the judges, he declined to issue a subpoena in the case before him, as it concerned a record obligation, and reserved his judgment as to what should be done in the case of a specialty.² But the common course of relieving the obligor of a paid specialty was adhered to,³ and was later extended to the case of the paid record obligation.⁴

In 1707, by St. 4 & 5 Anne, c. 16, § 11, payment without a release was made a valid legal defense.

Accord and Satisfaction.—From time immemorial the accept-

¹ Y. B. 5 Hen. IV. 2, 6; Y. B. 22 Hen. VI. 52, 24; Y. B. 37 Hen. VI. 14, 3; Y. B. 5 Ed. IV. 4, 10; Y. B. 1 Hen. VII. 14, 2; Waberley v. Cockerell, Dy. 51, pl. 12; Cross v. Powell, Cro. El. 483; Atkins v. Farr, 2 Eq. Ab. 247; Lacey v. Lacey, 7 Barr, 251, 253. In the last case GIBSON, C. J., said: "Even if a bond, thus delivered [to the obligor] but not cancelled, come again to the hands of the obligee, though it be valid at law, the obligor will be relieved in equity." In Morris v. Lutterel (41 Eliz.), Cro. El. 672, the defendant on his way to perform the condition of the bond was imprisoned by plaintiff (the obligee) until the time for performing the condition was past. This was no defense to an action on the bond.

² Y. B. 22 Ed. IV. 6, 18.

³ Y. B. 7 Hen. VII. 12, 2; Doct. & St., Dial. I. c. 12, Dial. II. c. 6; Cavendish v. Forth, Toth. 90; Dowdenay v. Oland, Cro. El. 708; Huet v. De la Fontaine, Toth. 273. In the treatise on subpoena in the appendix to Doct. & St., 18th ed., the practice of giving equitable relief to the obligor is vigorously attacked by a sergent-at-law, who says: "I marvel much what authority the Chancellor hath to make such a writ in the king's name, and how he dare presume to make such a writ to let [hinder] the king's subjects to sue his laws, the which the king himself cannot do righteously; . . . and so meseemeth that such a suit by a subpoena is not only against the law of the realm, but also against the law of reason. Also, meseemeth, that it is not conformable to the law of God. For the law of God is not contrary in itself, *i. e.*, to say one in one place and contrary in another place."

⁴ Clethero v. Beckingham, Toth. 276.

ance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrongdoer.¹ Accord and satisfaction was, likewise, a bar to an action for damages arising from a breach of a covenant.² But if the covenant was of such a nature as to create a debt, the creditor's right to maintain an action at law was in no wise affected, although he might have received, in satisfaction of the debt, property far exceeding in value the amount due by the specialty.³ "There is a difference where a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond to pay a sum of money; there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty. But where no certain duty accrued by the deed, but a wrong or default subsequent together with the deed gives an action to recover damages, which are only in the personalty; for such wrong or default accord with satisfaction is a good plea."⁴ In other words, the breach of a covenant sounding in damages, like the breach of an assumpsit, seems to have been conceived of as a tort;⁵ whereas a specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release. This continued the rule at common law until 1854, when the specialty debtor was, by statute, allowed to bar the satisfied creditor by a plea on equitable grounds;⁶ for he was plainly entitled before this time to a permanent unconditional injunction.⁷

¹ Anon., Y. B. 21 & 22 Ed. I. 586; Y. B. 8 Hen. VI. 25, 13; Y. B. 34 Hen. VI. 43, 44; Andrew v. Boughey, Dy. 75, pl. 23.

² Blake's Case, 6 Rep. 43 b, Cro. Jac. 99, s. c.; Eeles v. Lambert, Al. 38; Spence v. Healey, 8 Ex. 668; Mitchell v. Hawley, 4 Den. 414.

³ Preston v. Christmas, 2 Wils. 86; Mussey v. Johnson, 1 Ex. 241; Steeds v. Steeds, 22 Q. B. D. 537; Savage v. Blanchard, 148 Mass. 348, 350; Mitchell v. Hawley, 4 Den. 414.

⁴ Blake's Case, 6 Rep. 43 b.

⁵ "And when it [the covenant] is broken, the action is not founded merely upon the specialty as if it were a duty, but savors of trespass, and therefore an accord is a good plea to it." Eeles v. Lambert, Al. 38. "But the cause of action accrues by the tort subsequent." Rabbetts v. Stoker, 2 Roll. R. 187, 188. "Covenant is executory and sounds only in damages, and a tort, which (as it seems) dies with the person," per BALDWIN, J., in Anon., Dy. 14. See also Sir Frederick Pollock's "Contracts in Early English Law," 6 Harvard Law Review, 400.

⁶ Steeds v. Steeds, 22 Q. B. D. 537. See also Savage v. Blanchard, 148 Mass. 348, 350.

⁷ Webb v. Hewitt, 3 K. & J. 438.

Discharge of Surety. — It is a familiar doctrine of English law that a creditor, who agrees to give time to a principal debtor, thereby discharges the surety unless he expressly reserves his right against the latter. But if the surety's obligation was under seal, his only mode of resisting the creditor on the ground of such indulgence was by applying to a court of equity for an injunction.¹ He had no *legal* defense to the creditor's action.² The rule was the same in England, and in a few of our States, where the principal and surety were co-makers of a promissory note.³

The English statute of 1854, introducing pleas on equitable grounds, now gives the surety an equitable defense at law. And, generally, in this country the defense has been allowed to actions on notes without the aid of a statute.⁴

Accommodation. — An obligee, for whose accommodation the obligor has executed an instrument under seal, certainly ought not to enforce the specialty against the obligor who has befriended him, and whom, by the very nature of the transaction, he was bound to save harmless from any liability to any one. But prior to 1854 the obligor would have had no defense at law to an action by the obligee. In *Shelburne v. Tierney*,⁵ a bill filed by the obligor to restrain an action by the obligee was assumed by both parties to be valid, but was defeated by an answer showing that the action, although in the name of the obligee, was really brought in behalf of an assignee of the obligation. The facts were similar in *Dickson v. Swansea Co.*,⁶ except that the obligor pleaded an equitable plea instead of filing a bill, and the obligee met this by an equitable replication to the same effect as the answer to the bill in *Shelburne v. Tierney*.⁷

¹ *Rees v. Berrington*, 2 Ves. Jr. 542.

² *Bulsteel v. Jarrold*, 8 Price, 467; *Davey v. Prendergrass*, 5 B. & Ald. 187; *Ashbee v. Pidduck*, 1 M. & W. 564; *Parker v. Watson*, 8 Ex. 404; *Sprigg v. Mt. Pleasant Bank*, 10 Pet. 257; *United States v. Howell*, 4 Wash. C. C. 620; *Locke v. United States*, 3 Mas. 446; *Wittmer v. Ellison*, 72 Ill. 301; *Tate v. Wymond*, 7 Blackf. 240; *Lewis v. Harbin*, 5 B. Mon. 564; *Pintard v. Davis*, Spencer, 205; *Shaw v. McFarlane*, 1 Ired. 216; *Holt v. Bodey*, 18 Pa. 207; *Dozier v. Lee*, 7 Humph. 520; *Burke v. Cruger*, 8 Tex. 66; *Stephoe v. Harvey*, 7 Leigh, 501; *Sayre v. King*, 17 W. Va. 562.

³ *Pooley v. Harradine*, 7 E. & B. 431; *Yates v. Donaldson*, 5 Md. 389; *Anthony v. Fritts*, 45 N. J. 1.

⁴ 2 Ames, Cas. on Bills and Notes, 82, n. 2.

⁵ 1 Bro. C. C. 434.

⁶ L. R. 4 Q. B. 44.

⁷ For similar decisions see *Farrar v. Bank of N. Y.*, 90 Ga. 331; *Meggett v. Baum*, 57 Miss. 22; *Freund v. Importer's Bank*, 76 N. Y. 352. But see *contra*, *Wetter v. Kiley*, 95 Pa. 461.

Duress. — The general rule, that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law to an action upon the instrument, was subject to one exception. As far back as Bracton's time, at least, one who had duly signed and sealed an obligation, and who could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress practised upon him by the plaintiff.¹ The Roman law was more consistent than the English law in this respect. For, by the *jus civile*, duress, like fraud, was no answer to a claim upon a formal contract. All defenses based upon the conduct of the obligee were later innovations of the prætor, and were known as *exceptiones prætorie*, or as we should say, equitable defenses.²

It is quite possible that the anomalous allowance of the defense of duress at common law may be due to some forgotten statute.³ But whatever its origin, the defense of duress does not differ in its nature from the defense of fraud. As Mr. Justice HOLMES well says: "The ground upon which a contract is voidable for duress is the same as in the case for fraud; and is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action."⁴ Duress was, therefore, never regarded as negating the legal execution of the obligation. "The deed took effect, and the duty accrued to the party, although it were by duress and afterwards voidable by plea."⁵ The defense is

¹ Bract. 16 b, 17. Duress is no bar to an action on a record. Hamond v. Barker, Cro. El. 88.

² The learned reader who desires to study the nature of the Roman *exceptio* will find the subject thoroughly discussed in Eisele, Die materielle Grundlage der Exceptio; Zimmermann, Kritische Bemerkungen zu Eisele's Schrift; Lenel, Ueber Ursprung und Wirkung der Exceptionen.

³ The language of Britton, 1 Nich. Britt. 47, is certainly significant: "We will that contracts made in prison shall be held valid unless made under such constraint as includes fear of death or torture of body; and in such case they shall reclaim their deeds as soon as they are at liberty and signify the fear they were under to their nearest neighbors and to the coroner; and if they do not reclaim such deeds by plaint within the year and day, the deeds shall be valid." See also 1 Nich. Britt. 223; Bract. 16 b, 17; 2 Bract. N. B. Nos. 182, 200; 3 Bract. N. B. Nos. 1643, 1913.

⁴ Fairbanks v. Snow, 145 Mass. 152, 154.

⁵ Y. B. 8 Hen. VI. 7, 15, per MARTIN, J. Duress was not admissible under a plea of *non est factum*. Y. B. 7 Ed. IV. 5, 15; Y. B. 1 Hen. VII. 15 b, 2; Y. B. 14 Hen. VIII. 28 a, 7; Whelpdale's Case, 5 Rep. 119. On the same principle, a feoffment under duress was effectual as a transfer of the seisin. Y. B. 2 Ed. IV. 21, 16; Y. B. 18 Ed. IV. 29, 27.

strictly personal, and not real; that is, it is effective, like all equitable defenses, only against the wrongdoer, or one in privity with him. Duress by a stranger cannot, therefore, be successfully pleaded in bar of an action by an innocent obligee;¹ and duress by the payee upon the maker of a negotiable note will not affect the rights of a subsequent *bona fide* holder for value.²

Agreement not to Sue. — It was easy in this kind of case for the common law to take cognizance of the agreement if it was absolute and unconditional, and where, therefore, a judgment for the defendant would settle the whole matter. But where this was not true, as in case of an agreement to forbear for a limited time only, the defendant was still obliged to resort to equity.

Acquiescence. — This is frequently a bar to an action at law, but it seems in its nature to be an equitable defense, the defendant's remedy in strict theory being an injunction in equity against the action at law. So in an early case in equity³ an injunction was granted, on the ground of acquiescence, against an action at law for a nuisance.⁴

By statute or judicial innovation, as we have seen, the jurisdiction of the common-law courts has been greatly extended, except in the Federal courts of this country, in the matter of defenses to actions on formal contracts. In all cases where, formerly, a defendant was obliged to apply to equity for relief against an unconscionable plaintiff, he may now defeat his adversary at law. But the change of forum does not mean any change in the essential character of the relief. The common law accomplishes, by peremptorily barring the action, the same result, and upon the same grounds, that the Chancellor effected by a permanent unconditional injunc-

¹ Y. B. 45 Ed. III. 6, 15 (*semble*); Anon., Keilw. 154, pl. 3; Fairbanks v. Snow, 145 Mass. 152.

² Duncan v. Scott, 1 Camp. 100 (*semble*); Beals v. Neddo, 1 McCrary, 206; Hogan v. Moore, 48 Ga. 156; Lane v. Schlemmer, 114 Ind. 296; Bank v. Butler, 48 Mich. 192; Briggs v. Ewart, 51 Mo. 249 (*semble*); Clark v. Pease, 41 N. H. 414. Similarly a grantor under duress cannot recover his property if the wrongdoer has conveyed it to an innocent purchaser. Rogers v. Adams, 66 Ala. 600; Deputy v. Stapleford, 19 Cal. 302; Bazemore v. Freeman, 58 Ga. 276; Lane v. Schlemmer, 114 Ind. 296; Mundy v. Whittemore, 15 Neb. 647; Schroader v. Decker, 9 Barr, 14; Cook v. Moore, 39 Tex. 255; Tallay v. Robinson, 22 Grat. 888.

³ Anon., 2 Eq. Abr. 522.

⁴ See also Rochdale Co. v. King, 2 Sim. N. S. 78, 89; Williams v. Jersey, 1 Cr. & Ph. 92; Nicholson v. Harper, 4 My. & Cr. 175.

tion. It is as true to-day as it ever was, that fraud, payment, and the like do not nullify the title of the fraudulent or paid obligee, but are simply conclusive reasons why he ought not to enforce his title.

The truly equitable or personal character of these defenses at law has commonly only a theoretical value in actions upon the ancient common-law specialty, the instrument under seal.¹ But it is of the highest practical importance in actions upon the modern mercantile specialty, the bill of exchange or promissory note.² For the legal title to bills and notes, by reason of their negotiability, passes freely from hand to hand, and equity would not restrain, by injunction, any holder from enforcing his title, if he came by it honestly and for value. And the plea at law being, in substance, like the bill in equity for an injunction, we see at once the reason for the familiar rule that fraud and other defenses, based upon the conduct of the payee or some other particular person, cannot be successfully pleaded against any *bona fide* holder for value.

In almost all cases where the courts of law have encroached, it has been where the remedy could be given by a judgment for one party or the other. Take, for instance, recovery on a lost bond.³ All that had to be done was to permit the plaintiff to recover; nothing more was necessary. LORD ELDON was opposed to that case, but it has been law ever since.

This borrowing from equity and fusion of equity with the law has been one of the two most fruitful sources of the development of the common law; the other source has been the action on the case. Almost all development has been on one of these two lines. Nevertheless, though you may administer law and equity in the same court, so long as title, contract, rights in rem, &c., exist, you must keep the legal distinction between the two. The common law is distinctly unmoral, not immoral. Equity proceeded on another basis, of which constructive trusts may be taken as an example.

¹ But the equitable nature of these defenses explains the right of an innocent obligee to recover in covenant even though the defendant was induced to execute it by the improper conduct of a third person.

² Because assumpsit would lie upon them, the notion became current that bills and notes were simple contracts. In Scotland, and in Europe generally, a bill or note is recognized to be a *literarum obligatio*, and the logic of facts is sure to compel, eventually, a similar recognition in England and this country.

³ Read v. Brookman, 3 T. R. 151.

LECTURE XI.

ACCOUNT.

THERE are certain cases which the actions of debt and covenant did not cover. One of the most typical was that of a lord of a manor against his bailiff who received the rents. There were all kinds of items both ways. Another instance was where a principal employed a factor to buy and sell goods for him. To meet these cases an action of account was invented; just when is not clear, but it is almost certain that it is later than debt or covenant. The plaintiff had to get two judgments. He first brought action against the party for failing in his obligation to account, and got judgment that the defendant account; and then the account was taken before auditors, generally three in number, and if they found that money was due to the plaintiff he then got a second judgment to recover this. The account against a bailiff seems to be older than that against a factor. This explains why originally in charging the factor you had to charge him as a bailiff; that is, you had to call him bailiff.¹ It was afterwards decided that it was not essential to use the word "bailiff," or, at any rate, it could only be objected to by demurrer,² where the factor was called a receiver of merchandise; and afterwards that came to be the common form of charging him.

The bailiff's liability was not absolute. He was not liable for destruction without fault; it was enough if he took suitable care.³ A question of more interest was what was the relation between the factor and principal as to the title of the goods. Was title in the principal or the factor? I have a very strong impression that the title was always in the factor. I will give some reasons for my belief. In 2 Richard III. 14, 39, one of the judges said: "Action of account disaffirms property in the plaintiff." In 28 Henry VIII. it is said

¹ Y. B. 9 Ed. III. 36, 38; Y. B. 46 Ed. III. 9, 4; Anon., Keilw. 114, pl. 51.

² Burdet v. Thrule, 2 Lev. 126.

³ Y. B. 41 Ed. III. 3 b and 4 a, pl. 8; Woodlife's Case, Moore, 462; Anon., 2 Mod. 100.

that the property was in the bailiff.¹ A very strong case is found in Leonard's Reports,² where the court decided that money, though in a bag when delivered to the factor, becomes the property of the latter. The same idea is expressed in the time of Elizabeth.³ In 22 James I.⁴ it is said that I could not have detinue against the bailiff of merchandise. In *Burdett v. Willett*⁵ it was said that the proceeds of a factor's sales do not go into his assets. A factor is in the nature of a trustee, and though he has the right at law he is in equity but a trustee. The same statement is made by LORD HARDWICKE in *Ex parte Dumas*,⁶ who says that if bills are sent for collection the property is in the agent; and LORD ELDON expressed a similar idea in *Ex parte Pease*.⁷ This view explains some things which are otherwise inexplicable; namely, the condition of a *del credere* factor, who guarantees the payment. Such a factor's guarantee is not within the Statute of Frauds; but if he were selling the property of his principal it would seem that he would be guaranteeing the debt of another. It is well settled to-day that the title is not in the factor;⁸ and it is in accordance with this view that it was held that an innocent pledgee of the factor got no interest, a very unfortunate decision.⁹ Factors' acts in some jurisdictions have restored to the factor all the powers which a trustee would have, and perhaps something more.

The procedure in account was of course cumbrous and slow, and was superseded as soon as equity jurisdiction became established. In *Dale v. Sollet*¹⁰ LORD MANSFIELD held a bailiff liable in debt; but this was clearly without principle, since the claim was for an unliquidated amount. In *Scott v. M'Intosh*¹¹ it was held that assumpsit would not lie. *Tomkins v. Willshear*¹² decides that a man may have an action of assumpsit where account used to lie. This case overrules the case in 2 Campbell to the contrary.

Another form of the action of account existed where the defendant was charged simply as a receiver of so much money for the

¹ Core's Case, Dyer, 20 a.

² Higgs v. Holiday, Cro. El. 746.

³ 2 Vern. 638.

⁴ 19 Ves. 25, 35, 44, 46. See also Hassall v. Smithers, 12 Ves. 119, 122.

⁵ Godfrey v. Furzo, 3 P. Wms. 185; Zinck v. Walker, 2 W. Bl. 1154.

⁶ Paterson v. Tash, 2 Str. 1178; Smith Mercantile Law, 9th ed., 128.

⁷ 4 Burr. 2133.

⁸ 2 Camp. 238.

⁹ Anon., 3 Leon. 38.

¹⁰ Harris v. Bevoice, 2 Rolle, 440

¹¹ 2 Ves. 582.

¹² 5 Taunt. 431 (1814).

use of the plaintiff by the hands of a third person. Originally that was the only remedy where A. delivered money to B. for C. There was no debt because that presupposed a contract between the debtor and creditor, and in this case C. was no party to this transaction.

If A. delivered goods to B. for the use of C., C. could not have account, because in the case of goods title passed to C., and his remedy was *detinue*. But you could not have *detinue* for money even though you had particular pieces, unless the money was enclosed, as in a box; in that case you could bring *detinue* for the box. The defendant was charged as a receiver and not as a bailee.¹ C. can have an action of account for money delivered by A. to B. for his use;² but C. could not have an action of account for goods.³ He could have *detinue*.⁴ As to differences between account against a bailee or factor and account against a receiver: the bailee or factor was allowed his general expenses; a general receiver was not.⁵ For this reason a claim against a bailee or factor is always unliquidated and subject to some qualifications; a claim against a receiver is usually liquidated.⁶ A third difference which once existed was that in charging a defendant as a general receiver the name of the person from whom it was received must be stated, while in charging one as a factor it need not be.⁷

The form of the writ against a general receiver charged that money had been received for the use of the plaintiff. Twenty-five cases where that phrase is used, running back to Edward the First and coming down to the last century, have been found.⁸ In this state of affairs attempts were made at a comparatively recent period to bring debt against the receiver; but these attempts were unsuccessful.⁹ The

¹ Y. B. 38 Hen. VI. 5, 14. A statement to the contrary in Fitzh. Abr. Acc. 47, is wrong.

² 32 Ed. III., Fitzh. Abr. Acc. 108; Harrington v. Deane, Hobart, 36, pl. 40; Brownl. 26; Clark's Case, Godbolt, 210, pl. 299.

³ Y. B. 20 Hen. VI. 16, 2.

⁴ Y. B. 13 Ed. III. 244; Brand v. Lesley, Yelverton, 164; Haille v. Smith, 1 B. & P. 563.

⁵ Y. B. 46 Ed. III. 9, 4; Suffolk v. Floyd, 2 Bulst. 277, 1 Rolle, 87; Bishop v. Eagle, 10 Mod. 22, 23.

⁶ Y. B. 9 Hen. V. 3, 9; 2 Rich. II., Fitzh. Abr. Acc. 45, 46; Gomersall v. Gomersall, Godb. 55, 57, 58.

⁷ Y. B. 43 Ed. III. 21, 11; Y. B. 46 Ed. III. 3, 6.

⁸ Harris v. de Bervoir, Cro. Jac. 687; Robsert v. Andrews, Cro. El. 82; Walker v. Holyday, Com. 272, will serve as examples.

⁹ Y. B. 41 Ed. III. 10, 5; 2 Rich. II., Bellewe, Acc. 7; Y. B. 6 Hen. IV. 7, 33.

first case in which an action of debt in such a situation was allowed was in the time of Henry VIII.,¹ and from that time on it has been perfectly settled that the plaintiff has an option to bring either debt or account.² Whenever you could have debt you could have *indebitatus assumpsit*, and this is the origin of the count for money had and received for the use of the plaintiff.³

You will find modern cases full of discussions of the necessity of privity in the count for money had and received. But there was never any necessity of privity in the old action of account, and when debt and *indebitatus assumpsit* became concurrent remedies the requisites for account should be regarded as sufficient, and privity should not be brought in. All that you should be obliged to find is that A. gave the money to B. for the use of C., and that B. took it on that basis. The modern difficulty has arisen from the form of action being *assumpsit*, which in general is only allowed to the promisee. A. also could sue B., and A. or C. would win according to which sued first. As to the propriety of bringing debt or *assumpsit*, debt could only be brought on a liquidated liability. But is there any unconditional liability in the case supposed? Suppose, for instance, that the property was stolen from B. without his fault; though there is not much authority, it seems that he would no longer be bound. This was an additional difficulty in enforcing an action of debt.

The action of account is very analogous to a trust. There is a marked analogy between a receipt of money by B. to the use of C., a bailment of goods to B. for the use of C., and a feoffment of land to B. for the use of C. In the case of goods the title passed, and C. had a legal remedy; in the case of land there was no remedy except in equity; in the case of money the only remedy was account. But the care required is the same in all three cases, — the liability apart from procedure was the same.

Suppose that goods were delivered by A. to B. for C.'s use, or that

¹ Y. B. 19 Hen. VIII. 3, 15.

² *Beckingham v. Vaughan*, 1 Rolle, 391; *Key v. Gordon*, 12 Mod. 521 (*indebitatus assumpsit*).

³ Y. B. 1 Hen. V. 11, 21; Y. B. 36 Hen. VI. 9, 10, 5; Y. B. 18 Ed. IV. 23, 5; Y. B. 1 Ed. V. 2, 2; *Huntley v. Griffith*, Gold. 159. See also Ames, *Cases on Trusts*, 2d ed., 1, n. 3, 4, n. 1; *Atkin v. Barwick*, 1 Strange, 166; *De Bernales v. Fuller*, 14 East, 500, n. a; *Lilly v. Hays*, 5 Adol. & Ellis, 548; *Putnam v. Field*, 103 Mass. 556; *Pollock*, Cont., 2d Am. ed., 204, note.

money was delivered to B. for the use of C., and suppose in the one case that C. refused to take the goods or money and in the other case that B. refused to deliver the goods or money. In the first case it was clearly not the intention that B. should keep for himself, and it was settled that in such a case A. could bring an action of account. He could not bring detinue, because the title had passed. He might have account, and afterwards debt.¹ With regard to goods I find no authority where C. refused to take them. But on the second question, in regard to money and goods, A. could have an action of account.² Originally A. could not have debt;³ but afterwards he could.⁴ The question now comes, how far a contractual relation was necessary. Suppose a person collected the rents of an estate, assuming to act for the benefit of one entitled. Here there was no contract or agreement, and yet at an early period an action of account was allowed by the person entitled. The court proceeded on a vague notion of ratification of the defendant's action.⁵ But if the rents were collected by a disseisor the action could not be brought.

Where money was paid to the defendant by mistake, account was also allowed though there was no contract.⁶ To-day you have *indebitatus assumpsit* in this case.⁷

An action of account could never lie against a tortfeasor, with the exception that the King could have such an action.⁸ In accordance with this view an action of *indebitatus assumpsit* brought by the assignee of a bankrupt against the defendant, who tortiously sold the bankrupt's goods and received the proceeds, was held not to be maintainable;⁹ but in 1678, in *Arris v. Stukely*,¹⁰ the usurper

¹ Y. B. 19 Hen. VI. 69 a, 14; *Harris v. de Bevoice*, 2 Rolle, 440.

² Goods: Y. B. 9 Ed. IV. 46, 32; Y. B. 20 Hen. VI. 16, 2; Money: Y. B. 2 Ed. IV. 12, 50; Y. B. 21 Ed. IV. 42 b, 5.

³ Y. B. 19 Hen. VI. 5 a, 10.

⁴ Y. B. 19 Hen. VI. 69 a, 14; Y. B. 2 Rich. III. 15 a, 39; *Bretton v. Barnet*, Owen, 86.

⁵ Y. B. 4 Hen. VII. 6 b, 2, by Brian; *Gawton v. Lord Dacres*, 1 Leon. 219; *Hamond v. Ward*, Style, 287.

⁶ *Hewer v. Bartholomew*, Cro. El. 614; *Holt*, C. J., in *Courtenay v. Strong*, 2 Ld. Ray. 1217, 1218; *Bradsey v. Clyston*, Cro. Car. 541.

⁷ *Bize v. Dickason*, 1 Term Rep. 285; *Straton v. Rastall*, 2 Term Rep. 366.

⁸ Y. B. 33 Hen. VI. 2, 10; *Tottenham v. Beddingfield*, Dall. 99, pl. 30; s. c. 3 Leon. 24, pl. 50; *Tottenham v. Beddingfield*, Owen, 35, 83.

⁹ *Philips v. Tompson*, 3 Lev. 191. See also *Billon v. Hyde*, 1 Ves. Sr. 326, 327.

¹⁰ 2 Mod. 260.

of an office was held liable in *indebitatus assumpsit*, although it was objected that the action of account would not lie. The case was followed in *Howard v. Wood*.¹ *Hitchin v. Campbell* ² overruled the earlier decision that the action would not lie. This is an innovation on the old law that you could not have an action of account unless there was a contract in regard to the matter.

The important thing to remember is that the action of account is father of the count for money had and received.

¹ 2 Show. 23, 1 Freem. 473, 2 Lev. 245.

² 2 Wm. Bl. 827.

LECTURE XII.

SIMPLE CONTRACTS PRIOR TO ASSUMPSIT.

It is generally agreed by the Continental writers that in early German law, from which our law comes, only real and formal contracts were binding. The same is unquestionably true of the English common law from the time of Edward III. to the introduction of assumpsit towards the end of the fifteenth century. But Mr. Justice HOLMES in his *Common Law*, 260-264, and again in his essay on *Early English Equity*, 1 L. Q. Rev. 171-173, endeavors to show that the rule requiring a *quid pro quo* for the validity of a parol undertaking was not of universal application in England, and that a surety, in particular, might bind himself without a specialty prior to the reign of Edward III. If this opinion is well founded, an innovation and the abolition of the innovation must be accounted for. The evidence in favor of the validity during the two centuries following the Norman Conquest, of any parol obligation which was neither based upon a *quid pro quo* nor assumed in a court of record, should, therefore, be very strong to carry conviction. The evidence thus far adduced has failed to convince the present writer.

Prior to the appearance of assumpsit the contractual remedies in English law were debt, detinue, account, and covenant. Detinue and account, every one will agree, were based upon real contracts. Covenant lay only upon sealed instruments, that is, formal contracts. If, therefore, parol undertakings, other than real contracts, were ever recognized in early English law they must have been enforced by the action of debt. But no instance of such an action in the royal courts, it is believed, can be found.

Glanvill, Bracton, and Britton all recognize the validity of debts founded upon a specialty.¹ Glanvill also says in one place that no

¹ Glanvill, Lib. X. c. 12. "De debitibus laicorum quae debentur . . . de cartis debita continentibus." Bract. f. 100 b. "Per scripturam vero obligatur quis, ut si quis

proof is admissible in the king's court, if the plaintiff relies solely upon *fidei laesio*; and in another that the king's court does not enforce "*privatas conventiones de rebus dandis vel accipiendis in vadium vel alias hujusmodi*," unless made in that court, that is to say, unless they were contracts of record.¹ Bracton makes the statement that the king's court does not concern itself except occasionally *de gratia* with "*stipulationes conventionales*," which may be infinite in their variety.² The language of Fleta is most explicit against the validity of formless parol promises. "*Oportet igitur ex hoc quod aliquis ex promissione teneatur ad solutionem, quod scriptura modum continens obligationis interveniat, nisi promissio illa in loco recordum habenti recognoscatur. Et non solum sufficiet scriptura, nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum.*" The same principle was expressed a few years later in a case in Y. B. 3 Ed. II. 78. The plaintiff counted in debt on a grant for £200, showing a specialty as to £140, and offering suit as to the rest. Frisk, for defendant, said: "Every grant and every demand by reason of grant must be by specialty, but of other contracts,³ as of bailment or loan, one may demand

scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere." 1 Nich. Britt. 157, 162.

¹ Glanvill, Lib. X. c. 12, and c. 18.

² Bract. f. 100 a. As there are several cases in Bracton's Note Book, in which the validity of covenants affecting land are assumed to be valid, Bracton, in the passage just referred to, probably had in mind miscellaneous covenants. See Pollock, Contracts, 6th ed., 136. It is certainly true that the rule that any promise under seal may give rise to an action was a comparatively late development in the history of covenant. As late as the middle of the fourteenth century, SHARSHULL, J., said in Y. B. 21 Ed. III. 7, 20: "If he granted to you to be with you at your love-day, and afterwards would not come, perhaps you might have had a writ of covenant against him if you had a specialty to prove your claim."

³ The word contract was used in the time of the Year Books in a much narrower sense than that of to-day. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo*, e. g., a sale or loan. In other words, contract meant what we now mean by "real contract." What we now call the formal or specialty contract was anciently described as a grant, an obligation, a covenant, but not as a contract. See, in addition to the authorities cited in the text, Y. B. 17 Ed. III. 48, 14: a count in debt demanding "part by obligation and part by contract." Y. B. 29 Ed. III. 25, 26, "Now you have founded wholly upon the grant, which cannot be maintained without a specialty, for it lies wholly in parol, and there is no mention of a preceding contract." Y. B. 41 Ed. III. 7, 15, THORP, C. J.: "You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation, as here (a loan), it is a good plea." Y. B. 43 Ed. III. 2, 5, Debt on a judgment.

by suit. Therefore as you demand this debt by reason of grant and show no specialty but of part, judgment," &c. The plaintiff was nonsuited. In Y. B. 2 Ed. III. 4, 5, ALDEBURGH (Judge of C. B. four years later) said: "If one binds oneself to another in a debt in presence of people 'sans cause et sans especialtie,' never shall an action arise from this." The same doctrine is repeated in later cases in the fourteenth century.¹ In the light of these authorities it seems highly improbable that debt was ever maintainable in the king's court, unless the plaintiff could show either a specialty or a *quid pro quo* received by the defendant.

In the essay upon "Early English Equity," already referred to, the distinguished writer makes the further suggestion that, although the formless parol undertakings ultimately failed of recognition in the king's courts, the Church for a long time, with varying success, claimed a general jurisdiction in cases of *lesio fidei*; and that after the Church was finally cut down to marriages and wills, the clerical Chancellors asserted for a time in Chancery the power of enforcing parol agreements, for which the ordinary king's courts afforded no remedy. It is believed that undue importance has been attached to the proceedings in the spiritual court for *lesio fidei*. It is doubtless true that this court was eager to enlarge its jurisdiction, and to deal with cases of breach of faith not properly within its cognizance. We may also concede that the court was sometimes successful in keeping control of such cases when the defendant did not dispute the jurisdiction. But the authorities would seem to make it clear that from the time of the Constitutions of Clarendon, a prohibition would issue as a matter of course from the king's court upon the application of one who

Belknap objected "for there is no contract or covenant between them." 8 Rich. II. Bellewe, ed. 1869, 32, 111, "In debt upon contract the plaintiff shall shew in his count for what cause the defendant became his debtor. Otherwise in debt upon obligation." Y. B. 11 Hen. IV. 73 a, 11; 8 Rich. II. Bellewe, ed. 1869, 32, 111; Y. B. 39 Hen. VI. 34, 44; *Sharington v. Strotton*, Plowd. 298, 301, 302; Co. Lit. 292 b. The fanciful etymology given in Co. Lit. 47 b should be added: "In every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*."

¹ Y. B. 11 & 12 Ed. III. 587; Y. B. 18 Ed. III. 13, 7; Y. B. 44 Ed. III. 21, 23; Y. B. 48 Ed. III. 29, 15; Y. B. 9 Hen. V. 14, 23. The only statement in the Year Books to the contrary is the dictum of CANDISH, J., in 48 Ed. III. 6, 11: "And also this action of covenant of necessity is maintainable because for so slight a thing one cannot always have his clerk to make a specialty." The case in Y. B. 7 Ed. II. 242 can hardly be said to throw any light upon the question under discussion.

was drawn into the spiritual court upon breach of faith in a purely temporal matter.¹

Nor has the present writer been able to discover any traceable connection between the ecclesiastical claim of jurisdiction over *læsio fidei* and the jurisdiction of the Chancellor in the matter of parol agreements. If the Chancellor proceeded in the same spirit as the ecclesiastical judge, purely upon the ground of breach of faith, it would follow that in the absence of a remedy at common law, equity would give relief upon any and all agreements, even upon gratuitous parol promises. And Mr. Justice HOLMES seems to have so interpreted the following statement, which he cites from the Diversity of Courts (Chancery): "A man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law;" for he adds that the contrary was soon afterwards decided, citing Cary, 7: "Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law."² But, with all deference, the passage in the Diversity of Courts seems to have been misapprehended. There is really no contrariety between that passage and the extract from Cary. It is not asserted in the Diversity of Courts that one should have remedy for *all* parol covenants, where there was no remedy at common law. Full effect is given to the language used if it is taken to import that relief was given upon *some* parol covenants. So interpreted the Diversity of Courts accords with other authorities. For while it is confidently submitted that no instance can be found prior to the time of LORD ELDON³ in which

¹ Constitutions of Clarendon, c. 15, Stubbs, Sel. Chart. 134; Glanvill, Book X. c. 12; Abb. pl. 31, col. 1, rot. 21 (1200); 2 Br. N. B. No. 50 (1219); Fitz. Abr. Prohib. 15 (1220); 2 Br. N. B. No. 1893 (1227); Stat. Circumspecte Agatis, 13 Ed. I.; Y. B. 22 Lib. Ass. 70; Y. B. 2 Hen. IV. 10, 45; Y. B. 7 Hen. IV. 1, 5; Y. B. 11 Hen. IV. 88, 40; Y. B. 38 Hen. VI. 29, 11; Y. B. 20 Ed. IV. 10, 9; Y. B. 22 Ed. IV. 20, 47; Y. B. 12 Hen. VII. 22 b, 2; Dr. & St. Dial. II. c. 24.

² Richardson said . . . that LORD ELLESMERE used to say that there were three things which he would never relieve in equity: 1. such leases as aforesaid; 2. concealments; 3. nude promises. Anon., Lit. 3. See also Alexander v. Cresheld, Toth. 21.

³ At the present day a gratuitous undertaking by the owner of property to hold the same in trust for another is enforced in equity. It is a singular fact that this anomalous doctrine seems to have been first sanctioned by the conservative LORD ELDON, in *Ex parte Pye*, 18 Ves. 140. It was well settled that a use could not be created by a similar gratuitous parol declaration. Indeed, as late as 1855, LORD CRANWORTH, in

Equity gave relief upon a gratuitous parol promise, it is certainly true that Chancery did in some cases furnish a remedy upon parol covenants. But in all these Chancery cases it will be found that the promisee, acting in reliance upon the promise, had incurred expense, or otherwise parted with property, and that the Chancellor upon an obvious principle of natural justice, compelled the promisor to make reparation for the loss caused by his breach of promise. Three such instances, between 1377 and 1468, are mentioned in the next lecture. Those instances may be supplemented by three similar cases which were brought to light by Mr. S. R. Bird.¹ In *Gardyners v. Keche* (1452-1454), Margaret and Alice Gardyners promised to pay the defendant £22, who on his part was to take Alice to wife. The defendant, after receiving the £22, "meaning but craft and disceyt," married another woman, "to the great disceyt of the said suppliants, and ageyne all good reason and conscience." The defendant was compelled to answer the bill. In *Leinster v. Narborough* (circa 1480) the defendant being betrothed to the plaintiff's daughter-in-law, but desiring to go to Padua to study law, requested the plaintiff to maintain his *fiancée*, and a maid-servant to attend upon her during his absence, and promised to repay upon his return all costs and charges incurred by the plaintiff in that behalf. The defendant returning after ten years declined to fulfil his promise, and the plaintiff filed his bill for reimbursement, and was successful.² In *James v. Morgan* (1504-1515), the defendant promised the plaintiff 100 marks if he would marry his daughter Elizabeth. The plaintiff accordingly "resorted to the said Elizabeth to his great costs and charges," and "thorow the desavebull comforde" of the defendant and his daughter delivered to the latter jewels, ribbons, and many other small tokens. Elizabeth having married another man through the "crafty and false meane" of the defendant, the plaintiff by his bill sought to recover the value of his tokens, and also the "gret costs and charges thorow his manyfold journeys."

Scales v. Maude, 6 D., M. & G. 43, 51, said that a mere declaration of trust by the owner of property in favor of a volunteer was inoperative. In *Jones v. Lock*, 1 Ch. Ap. 25, 28, he corrected this statement, yielding to the authority of what seemed to him unfortunate decisions.

¹ The Antiquary, Vol. IV. p. 185, reprinted in part in 3 Green Bag, 3.

² The Antiquary, Vol. V. p. 38.

In all these cases there was, it is true, a breach of promise. But there seems to be no reason to suppose that the Chancellors, in giving relief, were influenced, even unconsciously, by any recollection of ecclesiastical traditions in regard to *lasio fidei*. It was so obviously just that one who had intentionally misled another to his detriment should make good the loss, that we need not go further afield for an explanation of the Chancellor's readiness to give a remedy upon such parol agreements. In *A Little Treatise concerning Writs of Subpœna*,¹ written shortly after 1523, — that is, at about the same time as the *Diversity of Courts*, — occurs the following instructive passage: —

“There is a maxim in the law that a rent, a common, annuity, and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be perceived of his lands in D., &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and therefore inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion, without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna. But if he that made the sale of the rent had gone farther, and said that he, before a certain day, would make a sufficient grant of the rent, and after refused to do it, there an action upon the case should lie against him at the common law; but if he made no such promise at the making of the contract, then he that bought the rent hath no remedy but by subpœna, as it is said before.”

Here the subpœna is allowed in the absence of a promise. There could, therefore, be no question of breach of faith. But the money having been paid and received under the expectation of both parties that the plaintiff would get a valid transfer of the rent, it was plainly just that equity should not permit the defendant to rely on the absence of a remedy at common law as a means of enriching himself at the expense of the plaintiff.

It is hardly necessary to remind the learned reader of the analogy

¹ *Doct. & St.*, 18th ed., Appendix, 17; *Harg. L. Tr.* 334.

between the case just considered, and uses arising upon a bargain and sale, which were supported for the first time only a few years before.¹ It was doubtless the same principle of preventing unjust enrichment which led the Chancellor in the reign of Henry V. to give a legal sanction to the duty of the feoffee to uses which before that time had been a purely honorary obligation.

To sum up, then, the Ecclesiastical Court had no jurisdiction over agreements relating to temporal matters. Chancery gave relief upon parol agreements only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff, or upon the principle of preventing the unjust enrichment of the defendant; and the common law, prior to assumpsit, recognized only those parol contracts which were based upon a *quid pro quo*.

¹ Y. B. 21 Hen. VII. 18, 30.

LECTURE XIII.

EXPRESS ASSUMPSIT.¹

THE mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."² On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."³ A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.⁴

To the present writer⁵ it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are,

¹ From Harvard Law Review, Vol. II., p. 1, by permission; with manuscript additions by the author.

² Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

³ Salmond, History of Contract, 3 L. Q. Rev. 166, 178.

⁴ Hare, Contracts, Ch. VII. and VIII.

⁵ It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

as would be surmised, of distinct origin. The history of detriment is bound up with the history of special *assumpsit*, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of *assumpsit* will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned;¹ against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient;² against a smith for laming a horse while shoeing it;³ against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face;⁴ against a carpenter who undertook to build well and faithfully, but who built unskilfully.⁵

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of the cases and precedents there is no mention of reward or consideration. In *Powtuary v. Walton* ⁶ (1598), a case against a far-

¹ Y. B. 22 Ass. 94, pl. 41.

² Y. B. 43 Ed. III. 6, pl. 11; 11 Rich. II. Fitz. Abr. Act. on the Case, 37; Y. B. 3 Hen. VI. 36, pl. 33; Y. B. 19 Hen. VI. 49, pl. 5; Y. B. 11 Ed. IV. 6, pl. 10; *Powtuary v. Walton*, 1 Roll. Abr. 10, pl. 5; *Slater v. Baker*, 2 Wils. 359; *Sears v. Prentice*, 8 East, 348; *Prior v. Rillesford*, 17 Yorks. Arch. Soc., Rec. Ser., 78.

³ Y. B. 46 Ed. III. 19, pl. 19; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

⁴ 14 Hen. VII. Rast. Ent. 2, b. 1.

⁵ Y. B. 11 Hen. IV. 33, pl. 60; Y. B. 3 Hen. VI. 36, pl. 33; Y. B. 20 Hen. VI. 34, pl. 4; Y. B. 21 Hen. VI. 55, pl. 12; 18 Hen. VII. Keilw. 50, pl. 4; 21 Hen. VII. Keilw. 77, pl. 25; Y. B. 21 Hen. VII. 41, pl. 66; *Coggs v. Bernard*, 2 Ld. Ray. 909, 920; *Elsee v. Gatward*, 5 T. R. 143; *Benden v. Manning*, 2 N. H. 289. See also *Best v. Yates*, 1 Vent. 268. Bill in equity against a surgeon: 1 Cal. Ch. CXXIV. (1490-1500); *Fryday v. West*, 10 Seld. Soc'y (Cas. Ch.) pl. 128.

⁶ 1 Roll. Abr. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.

rier who undertook to cure the plaintiff's horse and who treated it so negligently and unskillfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit*." The gist of the action being tort, and not contract, a servant,¹ a wife,² or a child,³ who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of *assumpsit* against a farrier for laming the plaintiff's horse.⁴ But in practice *assumpsit* was rarely, if ever, resorted to.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor.⁵ NEWTON, C. J.: "Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse dies; shall the plaintiff have an action? I say, No." PASTON, J.: "You have not shown that he is a common surgeon to cure such

¹ Everard v. Hopkins, 2 Bulst. 332.

² Pippin v. Sheppard, 11 Price, 400.

³ Gladwell v. Steggall, 5 B. N. C. 733.

⁴ 2 Chitty, Pl., 7th ed., 458.

⁵ Y. B. 19 Hen. VI. 49, pl. 5.

horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." NEWTON, C. J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.¹

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."² This is, of course, not law to-day, and probably had ceased to be law when written. Blackstone simply repeated the doctrine of the Year-Books.³ The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of *assumpsit*. The normal remedy against a bailee was *detinue*. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in *detinue* might be defeated by the defendant's wager of law; if he had paid in advance for the safe custody of his property, he could not recover in *detinue* his money, but only the value of the property; *detinue* could not be brought in the King's Bench by original writ; and the procedure generally was less satisfactory than that in case. It is

¹ See to the same effect Y. B. 48 Ed. III. 6, pl. 11; 11 Rich. II. Fitz. Abr. Act. on Case, 37; Rast. Ent. 463 b.

² 1 Bl. Com. 431.

³ Y. B. 11 Ed. IV. 6, pl. 10; 1 Roll. Abr. 94, pl. 1; 1 Roll. Abr. 95, pl. 1.

not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449.¹ The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note: . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,² and was expressly stated a few years later.³

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII. Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case;⁴ and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of *Coggs v. Bernard*. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special *assumpsit* was an established form of action.

¹ Statham, *Abr. Act. on Case* (27 Hen. VI.).

² Y. B. 12 Ed. IV. 13, pl. 10.

³ Y. B. 2 Hen. VII. 11, pl. 9; *Keilw.* 77, pl. 25; *Keilw.* 160, pl. 2; Y. B. 27 Hen. VIII. 25, pl. 3.

⁴ *Keilw.* 160, pl. 2 (1510).

But, in fact, there are few instances of such declarations before the reign of Charles I.¹ Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of declaring against a bailee.² Oddly enough, the earliest attempts to charge bailees in *assumpsit* were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.³ The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in *assumpsit* on a gratuitous bailment.⁴

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express *assumpsit* by the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against a common carrier⁵ or innkeeper⁶ for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. FROWYK, C. J., says, in

¹ As late as 1745 it was objected in *Alcorn v. Westbrook*, 1 Wils. 115, that *assumpsit* was not the proper form for action against a pledgee.

² In *Williams v. Lloyd*, W. Jones, 179; *Anon.*, Comb. 371; *Coggs v. Bernard*, 2 Ld. Ray. 909; *Shelton v. Osborne*, 1 Barnard. 260; 1 Selw. N. P. (13th ed., 348, s. c.); *Brown v. Dixon*, 1 T. R. 274, the declarations were framed in tort.

³ *Howlet v. Osborne*, Cro. El. 380; *Riches v. Briggs*, Cro. El. 883, Yelv. 4; *Game v. Harvie*, Yelv. 50; *Pickas v. Guile*, Yelv. 128. See also *Gellye v. Clark*, Noy, 126, Cro. Jac. 188, s. c.; and compare *Smith's case*, 3 Leon. 88.

⁴ *Wheatley v. Low*, Palm. 281, Cro. Jac. 668, s. c.

⁵ 1 Roll. Abr. 2, pl. 4; *Rich v. Kneeland*, Hob. 17; 1 Roll. Abr. 6, pl. 4; *Kenrig v. Eggleston*, Al. 93; *Nichols v. More*, 1 Sid. 36; *Morse v. Slue*, 1 Vent. 190, 238; *Levett v. Hobbs*, 2 Show. 127; *Chamberlain v. Cooke*, 2 Vent. 75; *Matthews v. Hoskins*, 1 Sid. 244; *Upshare v. Aidee*, Com. 25; *Herne's Pleader*, 76; *Brownl. Ent.* 11; 2 *Chitty, Pl.*, 1st ed., 271.

⁶ Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 Hen. IV. 7, pl. 31; Y. B. 11 Hen. IV. 45, pl. 18; *Cross v. Andrews*, Cro. El. 622; *Gellye v. Clark*, Cro. Jac. 189; *Beedle v. Norris*, Cro. Jac. 224; *Herne's Pleader*, 170, 249.

1505, that the bailee shall be charged "*per cest parol super se assumpsit*." ¹ In *Fooley v. Preston*,² ANDERSON, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in *Mosley v. Fosset* ³ (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie." ⁴ But with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

Symons v. Darknoll ⁵ (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover." HYDE, C. J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.⁶

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former.⁷ This is an illustration of the rule that a tenant-at-will is not liable for

¹ Keilw. 77, pl. 25.

² 1 Leon. 297.

³ Moore, 543, pl. 720; 1 Roll. Abr. 4, pl. 5, s. c. The criticism in Holmes' "Common Law," 155, n. 1, of the report of this case seems to be without foundation.

⁴ See also *Evans v. Yeoman* (1635), Clayt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

⁵ Palm. 523. See also *Stanian v. Davies*, 2 Ld. Ray. 795.

⁶ 2 Inst. Cler. 185; 2 Chitty, Pl., 7th ed., 506, 507.

⁷ *Lothrop v. Thayer*, 138 Mass. 466.

negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the *Countess of Salop v. Crompton*,¹ a case against a tenant-at-will, GAWDY, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him, but to occupy and pay his rent." So also in *Coggs v. Bernard*,² POWELL, J., referring to the case of the *Countess of Salop*, says: "An action will not lie against a tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally."

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit*."

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,³ the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.⁴ How remote the action was from an action of contract appears plainly from a remark of CHOKE, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall

¹ Cro. El. 777, 784, 5 Rep. 13, s. c.

² 2 Ld. Ray. 909.

³ Fitz. Abr. Monst. de Faits, pl. 160 (1383).

⁴ Moor v. Russel, Skin. 104; 2 Show. 284, s. c.

not have an action of deceit; but if it was by deed, I shall have an action of covenant.”¹ That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge and BRIAN, C. J., agreed, although LITTLETON, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as CHOKE, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. *Stuart v. Wilkins*,² decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor’s warranty.

We have seen that an express undertaking of the defendant was originally essential to the actions against surgeons or carpenters and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the Book of Assizes is commonly cited, it is true, to show that from very early times one who sold goods, knowing that he had no title to them, was liable in an action on the case for deceit.³ This may have been the law.⁴ But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.⁵ Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other cases is illustrated by the familiar case of *Chandelor v. Lopus*⁶

¹ Y. B. 11 Ed. IV. 6, pl. 10.

² 3 Doug. 18.

³ Y. B. 42 Lib. Ass. pl. 8.

⁴ But see *Kenrick v. Burges*, Moore, 126, per GAWDY, J., and *Roswell v. Vaughan*, Cro. Jac. 196, per TANFIELD, C. B.

⁵ Y. B. 9 Hen. VI. 53, pl. 37; *Keilw.* 91, pl. 16; *Roswell v. Vaughan*, Cro. Jac. 196; *Burnby v. Bollett*, 16 M. & W. 644, 654.

⁶ Dy. 75 a, n. (23); Cro. Jac. 4.

(1606-1607). The count alleged that the defendant sold to the plaintiff a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except ANDERSON, C. J.) holding "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in *Baillie v. Merrill*.¹ The case of *Chandelor v. Lopus* has found an able defender in the Harvard Law Review. In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading, that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in *Chandelor v. Lopus*, if it had come before an English court of the present century.² But it is certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in *Barr v. Gibson*,³ "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.⁴ But in LORD HOLT's time an affirmation was equivalent to a warranty,⁵ and to-day a warranty of title is commonly implied from the mere fact of selling.⁶

However much the actions against a surgeon or carpenter for

¹ 1 Roll. R. 275. See also *Leakins v. Clizard*, 1 Keb. 522, per JONES.

² But see *Crosse v. Gardner*, 3 Mod. 261, Comb. 142, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

³ 3 M. & W. 390.

⁴ Co. Lit. 102 a; *Springwell v. Allen* (1649), Al. 91, 2 East, 448, n. (a), s. c.

⁵ *Crosse v. Gardner*, 3 Mod. 261; 1 Show. 65, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

⁶ *Eichholtz v. Bannister*, 17 C. B. N. s. 708; *Benj. Sale*, 3d ed., 620-631.

misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases also, like the actions for a false warranty, were actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i. e.*, for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no specialty.¹ In the same reign there was a similar case with the same result.² The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. MARTIN, J., like his predecessors, was against the action; COCKAYNE, J., favored it. BABINGTON, C. J., at first agreed with COCKAYNE, J., but was evidently shaken by the remark of MARTIN, J.: "Truly, if this action is maintained, one shall have trespass for breach of any covenant³ in the world," for he then said: "Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.⁴ MARTIN, J., appears finally to have

¹ Y. B. 2 Hen. IV. 3, pl. 9.

² Y. B. 11 Hen. IV. 33, pl. 60. See also 7 Hen. VI. 1, pl. 3.

³ Covenant was often used in the old books (for example, in *Sherrington v. Strotton*, Plow. 298, *passim*; *Diversitie of Courts, Chancerie*) in the sense of agreement, a fact sometimes overlooked, as in *Hare, Contracts*, 138, 139.

⁴ Y. B. 3 Hen. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. *Holmes, Common Law*, 267, 285; *Hare, Contracts*, 162. The point was this: Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labor. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. BABINGTON, C. J., and COCKAYNE, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a

won over the Chief Justice to his view, for, eight years later, we find BABINGTON, C. J., MARTIN and COTESMORE, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. PASTON, J., showed an inclination to allow the action.¹ In 1435 he gave effect to this inclination, holding, with JUYN, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.² But this decision was ineffectual to change the law. Made without a precedent, it has had no following. The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.³

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is given, and the reader will notice the striking resemblance between its phraseology and the later count in *assumpsit*. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. BABINGTON, C. J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." COTESMORE, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all

basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

¹ Y. B. 11 Hen. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26.

² Y. B. 14 Hen. VI. 18, pl. 58.

³ Y. B. 20 Hen. VI. 25, pl. 11, per NEWTON, C. J.; Y. B. 20 Hen. VI. 34, pl. 4, per AYSOGHE, J.; Y. B. 21 Hen. VI. 55, pl. 12; Y. B. 37 Hen. VI. 9, pl. 18, per MOYLE, J.; Y. B. 2 Hen. VII. 11, pl. 9, and Y. B. 2 Hen. VII. 12, pl. 15, per TOWNSEND, J.; 18 Hen. VII. Keilw. 50, pl. 4, *per curiam*; Doct. & St. Dial. II. c. 24; *Coggs v. Bernard*, 2 Ld. Ray. 909, 919, per LORD HOLT; *Elsee v. Gatward*, 5 T. R. 143. NEWTON, C. J., said on several occasions (Y. B. 19 Hen. VI. 24 b, pl. 47; Y. B. 20 Hen. VI. 34, pl. 4; Y. B. 22 Hen. VI. 43, pl. 28) as did PRISOT, C. J., in Y. B. 37 Hen. VI. 8, pl. 18, that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncrasy of that judge, for his premise was plainly false. There was no *quid pro quo* to create a debt. See Y. B. 20 Hen. VI. 35, pl. 4.

that was before only covenant, for which deceit he shall have an action on his case."¹

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before the Exchequer Chamber a few years later.² It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for £100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as AYSCOGHE, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and FORTESCUE, J., accordingly thought the count bad. A majority of the judges, however, were in favor of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.³ In 1487 TOWNSEND, J., and BRIAN, C. J., agreed that a traverse of the feoffment to the stranger was a good traverse, since "that was the effect of the action, for otherwise the action could not be maintained."⁴ In the following year,⁵ the language of BRIAN, C. J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry

¹ Y. B. 11 Hen. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 Hen. VI. 25, pl. 11.

² Y. B. 20 Hen. VI. 34, pl. 4.

⁴ Y. B. 2 Hen. VII. 12, pl. 15.

³ Y. B. 16 Ed. IV. 9, pl. 7.

⁵ Y. B. 3 Hen. VII. 14, pl. 20.

VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an actionable deceit by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of FROWYK, C. J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeof you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies."¹

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case

¹ Keilw. 77, pl. 25, which seems to be the same case as Y. B. 20 Hen. VII. 8, pl. 18. Y. B. 21 Hen. VII. 41, pl. 66, per FINEUX, C. J., *accord*. See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa*." Br. Abr. Disceit, pl. 29. In 1455 there was an action on the case for a nonfeasance against a defendant who "*assumpsit super se pro certa pecunie summa*," but "*machinans, &c.*," made no enrolment. Y. B. 34 Hen. VI. 4, pl. 12.

upon the promise.¹ This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1522, the student of law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it."² From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.³

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. FAIRFAX, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery;⁴ and FINEUX, C. J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to use a *sub-pœna* in such cases.⁵

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases.⁶ In one of them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in trav-

¹ Y. B. 12 Hen. VIII. 11, pl. 3.

² Doct. and Stud. Dial. II. c. 24.

³ Y. B. 27 Hen. VIII. 24, pl. 3; *Pecke v. Redman* (1555), Dy. 113, the earliest reported case of assumpsit upon mutual promises; *Webb's Case* (1578), 4 Leon. 110; *Richards v. Bartlett* (1584), 1 Leon. 19; *Baxter v. Read* (1585), 3 Dyer, 272 b, note; *Foster v. Scarlett* (1588), Cro. El. 70; *Sturlyn v. Albany* (1588), Cro. El. 57; *Greenleaf v. Barker* (1590), Cro. El. 193; *Knight v. Rushworth* (1596), Cro. El. 469; *Bane's Case* (1611), 9 Rep. 93 b. See *Kirby v. Eccles*, 1 Leon. 186. These authorities disprove the remark of Mr. Justice HOLMES (Common Law), 287, that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (Summary of Contract, § 64) are open to similar criticism.

⁴ Y. B. 21 Ed. IV. 23, pl. 6.

⁵ Y. B. 21 Hen. VII. 41, pl. 66. "Sutton, plaintiff, Erington, defendant, a suit upon a promise and 12 pence accepted in consideration, referred to the Common Law, Anno 22 Eliz." Ch. Cas. Ch. 148.

⁶ Two other cases are given by Mr. S. R. Bird in the *Antiquary*, Vol. IV., p. 185, Vol. V., p. 38. See 8 *Harvard Law Review*, 256.

eling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpoena to compel the defendant to answer of his "disceit."¹ The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. *Appilgarth v. Sergeantson*² (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit."³ The remaining case, thirty years later,⁴ does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpoena.

Both in equity⁵ and at law, therefore,⁶ a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.⁷ By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.⁸ Damages were soon assessed, not upon the theory of reimbursement for the

¹ 2 Cal. Ch. II.

² 1 Cal. Ch. XLI.

³ An action on the case was allowed under similar circumstances in 1505, *Anon.*, Cro. El. 79 (cited).

⁴ Y. B. 8 Ed. IV. 4, pl. 11.

⁵ Y. B. 12 Hen. VII. 22 b, 23, 24 b.

⁶ The Chancellor (STILLINGTON) says, it is true, that a subpoena will lie against a carpenter for breach of his promise to build. But neither this remark nor the statement in *Diversitie of Courts*, Chancerie, justifies a belief that equity ever enforced gratuitous parol promises. But see *Holmes*, 1 L. Q. Rev. 172, 173; *Salmond*, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Abr. Act. on Case, pl. 72 [Specific Performance of Contract, *infra*]. The invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1522. Doct. & St. Dial. II. Ch. 22, 23, and 24. See a similar statement in *A Little Treatise Concerning Writs of Subpoena*, Doct. & St., 18th ed., Appendix, 17; Harg. L. Tr. 334, which was written shortly after 1523.

⁷ Y. B. 27 Hen. VIII. 24, 25, pl. 3; *Sidenham v. Worlington*, 2 Leon. 224; *Banks v. Thwaites*, 3 Leon. 73; *Shandois v. Simpson*, Cro. El. 880; *Sands v. Trevilian*, Cro. Car. 107; Doct. & St. Dial. II. Ch. 23 and 24; *Bret v. J. S.*, Cro. El. 756; *Milles v. Milles*, Cro. Car. 241; *Jordan v. Thomkins*, 6 Mod. 77. Contract originally meant what we now call a real contract, that is, a contract arising from the receipt of a *quid pro quo*, in other words, a debt. See 8 *Harvard Law Review*, 253, n. 3.

⁸ *Williams v. Hide*, Palm. 548, 549; *Wirral v. Brand*, 1 Lev. 165.

loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrongdoer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.¹ Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a disceit alleged."² Chief Baron GILBERT explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."³ This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,⁴ which persisted to the present century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first advanced by Judge HARE.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,⁵ decided in 1603, is commonly thought to be the source of this action.⁶ But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.⁷ The evidence of its existence throughout the last

¹ *Legate v. Pinchion*, 9 Rep. 86; *Sanders v. Esterby*, Cro. Jac. 417.

² *Corby v. Brown*, Cro. El. 470; *Elrington v. Doshant*, 1 Lev. 142.

³ Common Pleas, 53.

⁴ In Impey's King's Bench, 5th ed., 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."

⁵ 4 Rep. 92 a; Yelv. 21; Moore, 433, 667.

⁶ Langdell, Cont. § 48; Pollock, Cont., 4th ed., 144; Hare, Cont. 136, 137; Salmon, 3 L. Q. Rev. 179.

⁷ Br. Abr. Act. on Case, pl. 105 (1542).

half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."¹ In *Manwood v. Burston*² (1588), MANWOOD, C. B., speaks of "three manners of considerations upon which an assumpsit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor . . . (3) or there is a present consideration."³

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.⁴ The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.⁵ But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

Indebitatus assumpsit, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i. e.*, *quid pro quo*, or benefit. This may explain the inveterate

¹ Br. Abr. Act. on Case, pl. 5.

² 2 Leon. 203, 204.

³ See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Fulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill v. Harwood (C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. *Ashbrooke v. Snape* (B. R. 1591), Cro. El. 240. But this decision was not followed.

⁴ *Edwards v. Burr* (1573), Dal. 104; Anon. (1583), Godb. 13; *Estrigge v. Owles* (1589), 3 Leon. 200.

⁵ *Hinson v. Burridge*, Moore, 701; *Turges v. Beecher*, Moore, 694; *Paramour v. Payne*, Moore, 703; *Maylard v. Kester*, Moore, 711.

practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or the debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice in pleading to lay all assumpsits as made *in consideratione* of the detriment or debt.¹ And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.²

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.³ Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a

¹ In *Joscelin v. Sheldon* (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear. In *Whorwood v. Gibbons* (1577), Goldesb. 48, 1 Leon. 61 s. c., it was said by the court to be "a common course in action upon the case against him, by whom the debt is due, to declare without any words *in consideratione*."

² See also Mr. Salmond's criticism of this theory in 3 L. Q. Rev. 178.

³ 31 Hen. VI. Fitz. Abr. Subp. pl. 23; *Fowler v. Iwardby*, 1 Cal. Ch. LXVIII.; *Pole v. Richard*, 1 Cal. Ch. LXXXVIII.; Y. B. 20 Hen. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.

bargain or covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitively established.¹ But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor or covenantor.² The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,³ it was required also in the grant of a use. Equity might, conceivably, have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.

¹ Y. B. 21 Hen. VII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1565, of Sharrington v. Strotton, Plow. 295. In 1533 HALES said: "A man cannot change a use by a covenant which is executed before, as to covenant to be seised to the use of W. S. because that W. S. is his Cosin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same Land. But otherwise of a consideration, present or future, for the same purpose, as for one hundred pounds paid for the Land *tempore conventionis*, or to be paid at a future day, or for to marry his daughter, or the like." Bro. Abr. Feff. al use, 54.

² Plow. 298, 308; Buckley v. Simonds, Winch, 35-37, 59, 61; Hore v. Dix, 1 Sid. 25, 27; Pybus v. Mitford, 2 Lev. 75, 77.

³ That a debt as suggested by Professor Langdell (Contracts), § 100, was regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. Chawner v. Bowes, Godb. 217. See also 1 Roll. Abr. 518, pl. 2 and 3; Brown v. Hancock, Helt. 110, 111, per BARKLEY.

LECTURE XIV.

IMPLIED ASSUMPSIT.¹

NOTHING impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding lecture, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty the vendor's affirmation as to quality or title was not admissible, before the time of LORD HOLT, as a substitute for an express undertaking. We are quite prepared, therefore, to find that the action of assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, assumpsit would not lie in certain cases even though there were an express promise. For example, a defendant who promised to pay a sum certain in exchange for a *quid pro quo* was, before Slade's case,² chargeable only in debt unless he made a second promise to pay the debt.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus As-*

¹ Reprinted by permission from 2 Harvard Law Review 53, with manuscript additions by the author.

² 4 Rep. 92 a.

sumpsit became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then debt lies, and not *assumpsit*; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod WHIDDON and SOUTHCOTE, JJ., with the assent of CATLIN, C. J., concesserunt.*"¹ The consideration in this class of cases was accordingly described as a "debt precedent."² The necessity of a subsequent promise is conspicuously shown by the case of *Maylard v. Kester*.³ The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because debt lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before *Slade's* case, sanctioned the action of *assumpsit* upon a promise in consideration of a precedent debt, refuse, during the same period, to allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.⁴ A bargain and sale, and a loan, were exchanges of values. The action of debt,

¹ Dal. 84, pl. 35.

² *Manwood v. Burston*, 2 Leon. 203, 204.

³ *Moore*, 711 (1601).

⁴ See Langdell, *Contracts*, § 100.

as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. This conception of a debt was clearly expressed by VAUGHAN, J., who, some seventy years after Slade's case, spoke of the action of assumpsit as "much inferior and ignobler than the action of debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of debt into actions on the case; for contracts of debt are reciprocal grants."¹

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in assumpsit.

As the actions of assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of assumpsit, with its procedural advantages, as a concurrent remedy with debt were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case

¹ Edgecomb v. Dee, Vaugh. 89, 101. Si homme countast simplement d'un graunte d'un dette, il ne serra mye resceu saunz especialte" per SHARSHALL, J., Y. B. 11 & 12 Ed. III. 587.

both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of debt." Inasmuch as the judges were giving a new interpretation to an old transaction, since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of covenant. Strange as it may seem, covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, debt was the appropriate action for their recovery.¹ The writer has discovered no case in which a plaintiff succeeded in an action of covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the court that an action of covenant lay upon it, as well as an action of debt, at the election of the plaintiff."² The same right of election was conceded by the court in two cases³ in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in *Chawner v. Bowes*,⁴ in the Common Bench, four years later, *WARBURTON and NICHOLS, JJ.*, said: "If a man covenant to pay £10 at a day certain, an action of debt lieth

¹ Anon. (1591), 1 Leon. 208. "*Per Curiam*. If one covenant to pay me 100*l.* at such a day, an action of debt lieth; *a fortiori* where the words of the deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract *secundum subjectam materiam*."

² Anon. (1585), 3 Leon. 119.

³ Anon., 1 Roll. Abr. 518, pl. 3; *Strong v. Watts*, 1 Roll. Abr. 518, pl. 2. See also *Mordant v. Watts*, Brownl. 19; Anon., Sty. 31; *Frere v. —*, Sty. 133; *Norrice's Case*, Hard. 178.

⁴ Godb. 217.

for the money, and not an action of covenant." As late as 1628, in the same court, *BERKELEY*, Serjeant, in answer to the objection that covenant did not lie, but debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement."¹ Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.²

That covenant became concurrent with debt on a specialty so many years after assumpsit was allowed as a substitute for debt on a simple contract, was doubtless due to the fact that there was no wager of law in debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,³ money lent,⁴ money paid at the defendant's request,⁵ money had and received to the plaintiff's use,⁶ work and labor at

¹ *Brown v. Hancock*, *Hetl.* 110, 111.

² Plaintiff had option of debt or covenant for rent in *C. B.* in 1600. *Sicklemore v. Simonds*, *Cro. El.* 797. But debt would lie for rent reserved apart from covenant.

³ *Hughes v. Rowbotham* (1592), *Poph.* 30, 31; *Woodford v. Deacon* (1608), *Cro. Jac.* 206; *Gardiner v. Bellingham* (1612), *Hob.* 5, 1 *Roll. R.* 24, s. c.

⁴ *Rooke v. Rooke* (1610), *Cro. Jac.* 245, *Yelv.* 175, s. c.

⁵ *Rooke v. Rooke*, *supra*; *Moore v. Moore* (1611), 1 *Bulst.* 169.

⁶ *Babington v. Lambert* (1616), *Moore*, 854.

the defendant's request,¹ or upon an account stated,² and that the defendant being so indebted promised to pay. (This was the origin of the common counts.)

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.³ Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.⁴ The tailor was in the same case with the innkeeper, and his right to recover upon a *quantum meruit* was recognized in 1610.⁵ SHEPPARD,⁶ citing a case of the year 1632,

¹ Russell v. Collins (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Keb. 552, s. c.

² Brinsley v. Partridge (1611), Hob. 88; Vale v. Egles (1605), Yelv. 70, Cro. Jac. 69.

³ "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per BRIAN, C. J. To the same effect, Young v. Ashburnham (1587), 3 Leon. 161; Mason v. Welland (1688), Skin. 238, 242.

⁴ "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges which he caused in the house." Warbrooke v. Griffin, 2 Brownl. 254, Moore, 876, 877, s. c.

⁵ Six Carpenters' Case, 8 Rep. 147 a. But the statement that the tailor could recover in debt is contradicted by precedent and following authorities.

⁶ Actions on the Case, 2d ed., 50. Shepp. Faithf. Counsellor, 2d ed., 125.

says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."¹ In *Nichols v. More*² (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The court, however, answered that "the carrier may declare upon a *quantum meruit*, like a tailor, and therefore shall be charged."³ As late as 1697, POWELL, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."⁴

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In *Bosden v. Thinne*⁵ (1603) the plaintiff at the defendant's request had executed a bond as surety for one F., and had been cast in a judgment thereon. (The judges all agreed that upon the first request only assumpsit did not lie, YELVERTON, J., adding: "For a bare request does not imply any promise, as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like.") The absence of any remedy at law was conceded in 1662.⁶ It was said by BULLER, J., in *Toussaint v. Martinnant*,⁷ that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before GOULD, J.,⁸ at Dorchester, "which was decided on equitable grounds." The innovation seems to be due, however, to LORD MANSFIELD, who ruled in favor of a surety in *Decker v. Pope*, in 1757, "observing that

¹ *Thursby v. Warren*, W. Jones, 208.

² 1 Sid. 36. See also *Boson v. Sandford* (1689), per EYRES, J.

³ The defendant's objection was similar to the one raised in Y. B. 3 Hen. VI. 36, pl. 33.

⁴ *Hayward v. Davenport*, Comb. 426.

⁵ *Yelv.* 40.

⁶ *Scott v. Stephenson*, 1 Lev. 71, 1 Sid. 89, s. c. But see *Shepp. Act. on Case*, 2d ed., 49; *Shepp. Faithf. Couns.*, 2d ed., 124.

⁷ 2 T. R. 100, 105.

⁸ *Justice of the Common Pleas*, 1763-1794.

when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law."¹

The late development of the implied contract to pay *quantum meruit*, and to indemnify a surety, would be the more surprising, but for the fact that equity gave relief to tailors and the like, and to sureties long before the common law helped them. SPENCE, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The learned writer adds that "there were suits for wages and many others of like nature."² A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds "*quod nota.*"³

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*

¹ 1 Sel. N. P., 13th ed., 91. "Formerly it was thought that the remedy was only in equity; but in that case [Exon v. Partridge (1799), 8 T. R. 310] it was held that if one in the nature of a surety paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in equity." LORD ELDON in *Stirling v. Forrester* (1821), 3 Bligh, 575.

² 1 Spence, Eq. Jur. 694. *Daie v. Hampden* (1628), Toth. 174. "Concerning salary for serving of a cure."

³ *Ford v. Stobridge*, Nels. Ch. 24. In 1613, in *Wormleighton v. Hunter*, Godb. 243, a surety was denied the right of contribution even in equity. The right was given, however, early in the reign of Charles I. *Fleetwood v. Charnock* (1630), Nels. 10, Toth. 41, s. c.; *Parkhurst v. Bathurst* (1630), Toth. 41; *Wilcox v. Dunsmore* (1637), Toth. 41. The first intimation of a right to contribution at law is believed to be the *dictum* of LORD KENYON in *Turner v. Davies* (1796), 2 Esp. 479. The right to contribution at law was established in England by *Cowell v. Edwards* (1800), 2 B. & P. 268. But in North Carolina, in 1801 a surety failed because he proceeded at law instead of in equity. *Carrington v. Carson*, Cam. & Nor. Conf. R. 216.

even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.¹ The already established practice of suing upon a promise to pay a precedent debt, made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.² To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,³ or, by a similar fiction, the consideration was brought forward or continued to the promise.⁴ This fiction doubtless enabled plaintiffs sometimes to recover, although the promise was not identical with what would be implied, and in some cases even where it would be impossible to imply any promise.⁵ But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence in early times of the promise implied in fact, also makes intelligible a distinction in the law of lien, which greatly puzzled LORD ELLENBOROUGH and his colleagues. WILLIAMS, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."⁶ In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.⁷ As soon as

¹ The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

² Sidenham v. Worlington (1585), 2 Leon. 224.

³ Langdell, Contracts, § 92.

⁴ Langdell, Contracts, § 92; 1 Vin. Abr. 280, pl. 13.

⁵ Langdell, Contracts, §§ 93, 94.

⁶ 2 Roll. Abr. 92, pl. 1, 2.

⁷ An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. The Hostler's Case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. Jones v. Pearle, 1 Stra. 556.

the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.¹ The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.² At length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unaware of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.³

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.⁴ But in *Chapman v. Allen* ⁵ (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in *Jackson v. Cummins*,⁶ this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labor and skill in the improvement of the chattels" delivered to them.⁷

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a

¹ "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." *Watbrooke v. Griffith* (1609), Moore, 876, 877, 2 Brownl. 254, s. c.

² *Chapman v. Allen*, Cro. Car. 271; *Collins v. Ongly*, Selw. N. P., 13th ed., 1312, n. (x), per LORD HOLT; *Brennan v. Currant* (1755), Say. 224, Buller, N. P., 7th ed., 45, n. (c); *Cowell v. Simpson*, 16 Ves. 275, 281, per LORD ELDON; *Scarfe v. Morgan*, 4 M. & W. 270, 283, per PARKE, B.

³ *Chase v. Westmore*, 5 M. & Sel. 180.

⁴ 2 Roll. Abr. 85, pl. 4 (1604); *Mackerney v. Erwin* (1628), Hutt. 101; *Chapman v. Allen* (1632), 2 Roll. Abr. 92, pl. 6, Cro. Car. 271, s. c. See also Bro. Abr. Distresse, 67.

⁵ 2 Roll. Abr. 92, pl. 6, Cro. Car. 271, s. c.

⁶ 5 M. & W. 342.

⁷ The agistor has a lien by the Scotch law. Schouler, *Bailments*, 2d ed., § 122.

release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. *Tilford v. French*¹ (1663) is a case in point. So, also, seven years later, "it was said by TWISDEN, J., that if two submit to an award, this contains not a reciprocal promise to perform; but there must be an express promise to ground an action upon."² This doctrine was abandoned by the time of LORD HOLT, who, after referring to the ancient rule, said: "But the contrary has been held since; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by his determination, for agreeing to refer is a promise in itself."³

In the cases already considered the innovation of assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen,⁴ was allowed, in the time of Charles I., in competition with detinue and case against a bailee for custody. At a later period LORD HOLT suggested that one might "turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire."⁵ *Dale v. Hall*⁶ (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper.⁷

Account was originally the sole form of action against a factor or bailiff. But in *Wilkins v. Wilkins*⁸ (1689) three of the judges favored an action of assumpsit against a factor because the action was brought upon an express promise, and not upon a promise by

¹ 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, *Penruddock v. Monteagle* (1612), 1 Roll. Abr. 7, pl. 3; *Browne v. Downing* (1620), 2 Roll. R. 194; *Read v. Palmer* (1648), Al. 69, 70.

² Anon., 1 Vent. 69.

³ *Squire v. Grevell* (1703), 6 Mod. 34, 35. See similar statements by LORD HOLT in *Allen v. Harris* (1695), 1 Ld. Ray. 122; *Freeman v. Barnard* (1696), 1 Ld. Ray. 248; *Purslow v. Baily* (1704), 2 Ld. Ray. 1039; 6 Mod. 221, s. c.; *Lupart v. Welson* (1708), 11 Mod. 171.

⁴ See preceding lecture.

⁵ Comb. 334.

⁶ 1 Wils. 281. See also *Brown v. Dixon*, 1 T. R. 274, per BULLER, J.

⁷ *Morgan v. Ravey*, 6 H. & N. 265. But see *Stanley v. Bircher*, 78 Mo. 245.

⁸ 1 Show. 71, Carth. 89, 1 Salk. 9. Holt, 6, s. c.

implication. LORD HOLT, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account."¹ The requisite of an express promise was heard of no more. Assumpsit became theoretically concurrent with account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.²

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*."³

It remains to consider the development of *indebitatus assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts."⁴

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As assumpsit cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e. g.*, the duty of the

¹ But in *Spurraway v. Rogers* (1700), 12 Mod. 517, LORD HOLT is reported as allowing assumpsit against a factor only upon his express promise.

² *Tompkins v. Willshaer*, 5 Taunt. 430.

³ *Milton's Case* (1668), Hard. 485, per LORD HALE.

⁴ In *Finch, Law*, 150, they are called "as it were" contracts.

innkeeper to entertain,¹ of the carrier to carry,² of the smith to shoe,³ of the chaplain to read prayers, of the rector to keep the rectory in repair,⁴ of the *fidei-commiss* to maintain the estate,⁵ of the finder to keep with care,⁶ of the sheriff and other officers to perform the functions of their office,⁷ of the ship-owner to keep medicines on his ship,⁸ and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *indebitatus assumpsit* lies only where the duty is to pay money or a definite amount of chattels. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *indebitatus assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of Slade's case, which required, as we have seen, a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion that, from the time of that case, *indebitatus assumpsit* was concurrent with debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *indebitatus assumpsit* upon a customary duty seems to be *City of London v. Goree*,⁹ decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in assumpsit, three years later, for money forfeited under a by-law.¹⁰ So, also, in

¹ Keil. 50, pl. 4.

² Jackson v. Rogers, 2 Show. 327; Anon., 12 Mod. 3.

³ Steinson v. Heath, 3 Lev. 400.

⁴ Bryan v. Clay, 1 E. & B. 38.

⁵ Batthyany v. Walford, 36 Ch. Div. 269.

⁶ Story, Bailments, 8th ed., §§ 85-87.

⁷ 3 Bl. Com. 165.

⁸ Couch v. Steel, 3 E. & B. 402. But see Atkinson v. Newcastle Co., 2 Ex. Div. 441.

⁹ 2 Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, 8. C.

¹⁰ Barber Surgeons v. Pelson (1679), 2 Lev. 252. To the same effect, Mayor v. Hunt (1681), 2 Lev. 37, Assumpsit for weighage; Duppa v. Gerard (1688), 1 Show. 78, Assumpsit for fees of knighthood; Tobacco Co. v. Loder, 16 Q. B. 765.

1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *indebitatus assumpsit* lieth where the cause of action is grounded on a custom."¹ LORD HOLT had not regarded these extensions of *indebitatus assumpsit* with favor.² Accordingly, in *York v. Toun*,³ when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,⁴ "HOLT seemed to incline for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, HOLT, C. J., said that it should stay till dooms-day with all his heart; but ROKESBY, J., seemed to be of opinion that the action would lie. — *Et adjournatur*. Note. A day or two after I met the Lord Chief Justice TREBY visiting the Lord Chief Justice HOLT at his house, and HOLT repeated the said case to him, as a new attempt to extend the *indebitatus assumpsit*, which had been too much encouraged already, and TREBY, C. J., seemed also to be of the same opinion with HOLT." But ROKESBY's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,⁵ and the "metaphysical notion"⁶ of a promise implied in law became fixed in our law.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.⁷

¹ *Shuttleworth v. Garrett*, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, s. c.

² In *Smith v. Airey*, 6 Mod. 125, 129, he said: "An *indebitatus* has been brought for a tenant right fine, which I could never digest." See also *Anon.*, Farrelly, 12.

³ 5 Mod. 444.

⁴ 1 Ld. Ray. 502.

⁵ *Dupleix v. De Rover*, 2 Vern. 540.

⁶ *Starke v. Cheeseman*, 1 Ld. Ray. 538.

⁷ Professor Keener published his *Cases in Quasi-Contracts* in 1888, and followed it, in 1893, with his admirable treatise on the same subject.

The most fruitful manifestations of this doctrine in the early law are to be found in the action of account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in account.¹ Debt would also lie in such cases, since, at an early period, debt became concurrent with account, when the object of the action was to recover the precise amount received by the defendant.² By means of the fiction of a promise implied in law *indebitatus assumpsit* became concurrent with debt, and thus was established the familiar action of assumpsit for money had and received to recover money paid to the defendant by mistake. *Bonnel v. Fowke*³ (1657) is, perhaps, the first action of the kind.⁴

Although assumpsit for money had and received was in its infancy merely a substitute for account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of account. For a time, also, *indebitatus assumpsit* would not lie in such a case. LORD HOLT said in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*."⁵ His successors, however, allowed the action. Similarly, account was not admissible for

¹ *Hewer v. Bartholomew* (1597), Cro. El. 614; *Anon.* (1696), Comb. 447; *Cavendish v. Middleton*, Cro. Car. 141, W. Jones, 196, s. c.

² *Lincoln v. Topliff* (1597), Cro. El. 644.

³ 2 Sid. 4. To the same effect, *Martin v. Sitwell* (1690), 1 Show. 156, Holt, 25; *Newdigate v. Dary* (1692), 1 Ld. Ray. 742; *Palmer v. Staveley* (1700), 12 Mod. 510.

⁴ In *Mead v. Death* (1700), 1 Ld. Ray. 742, however, one who paid money under a judgment was not allowed to recover it, although the judgment was afterwards reversed. The rule to-day is, of course, otherwise. Keener, *Quasi-Contracts*, 417.

⁵ *Anon.*, Comb. 447.

the recovery of money paid for a promise which the defendant refused to perform. Here, too, debt and *indebitatus assumpsit* did not at once transcend the bounds of the parent action.¹ But in 1704 LORD HOLT reluctantly declined to nonsuit a plaintiff who had in such a case declared in *indebitatus assumpsit*.² Again, account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.³ It was decided, accordingly, in *Philips v. Thompson*⁴ (1675), that assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in assumpsit for the profits of the office, no objection being taken to the form of action.⁵ Objection was made in a similar case in 1677, that there was no privity and no contract; but the court, in disregard of all the precedents of account, answered: "An *indebitatus assumpsit* will lie for rent received by one who pretends a title; for in such cases an account will lie. Wherever the plaintiff may have an account an *indebitatus* will lie."⁶ These precedents were deemed conclusive in *Howard v. Wood*⁷ (1678), but LORD SCROGGS remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with trover, where the goods had been sold.⁸ Finally, under the influence of LORD MANSFIELD, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund."⁹

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another,

¹ *Brig's Case* (1623), Palm. 364; *Dewbery v. Chapman* (1695), Holt, 35; *Anon.* (1696), Comb. 447.

² *Holmes v. Hall*, 6 Mod. 161, Holt, 36, s. c. See also, *Dutch v. Warren* (1720), 1 Stra. 406, 2 Burr. 1010, s. c.; *Anon.*, 1 Stra. 407.

³ *Tottenham v. Bedingfield* (1572), Dal. 99, 3 Leon. 24, Ow. 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity to-day except as an incident to an injunction.

⁴ 3 Lev. 191.

⁵ *Woodward v. Aston*, 2 Mod. 95.

⁶ *Arris v. Stukely*, 2 Mod. 260.

⁷ 2 Show. 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.

⁸ *Jacob v. Allen* (1703), 1 Salk. 27; *Lamine v. Dorell* (1705), 2 Ld. Ray. 1216. *Philips v. Thompson*, *supra*, was overruled in *Hitchins v. Campbell*, 2 W. Bl. 827.

⁹ *Moses v. MacFerlan*, 2 Burr. 1005, 1012.

although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,¹ and would survive against his representative.² Nevertheless, the value of the goods consumed was never recoverable in *indebitatus assumpsit*. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.³

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in assumpsit, of an indebtedness for work and labor was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant, who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.⁴

By similar reasoning, assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.⁵

In assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a

¹ *Ex parte Adams*, 8 Ch. Div. 807, 819.

² *Philips v. Homfray*, 24 Ch. Div. 439.

³ The writer is indebted to Professor Keener for a correction of this statement, which is too broad. See 2 Keener, *Cas. on Quasi Contracts*, 606, 607, n. 1; Cooley, *Torts* (2d ed.), 109, 110; Pomeroy *Remedies* (2d ed.), §§ 568, 569.

⁴ *Lightly v. Clouston*, 1 Taunt. 112. See also *Gray v. Hill, Ry. & M.* 420.

⁵ But see *Mayor v. Sanders*, 3 B. & Ad. 411.

request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.¹

The main outlines of the history of assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

¹ *Turner v. Davies* (1796), 2 Esp. 476; *Cowell v. Edwards* (1800), 2 B. & P. 268; *Craythorne v. Swinburne* (1807), 14 Ves. 160, 164; *Exall v. Partridge* (1799), 8 T. R. 308.

LECTURE XV.

ASSUMPSIT FOR USE AND OCCUPATION.¹

IN the preceding lecture it was stated that *indebitatus assumpsit* for use and occupation was not allowed upon a quasi-contract, for special reasons connected with the nature of rent. To set forth briefly these reasons is the object of this excursus.

It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reservation. About the middle of the sixteenth century assumpsit was allowed upon an express promise to pay a precedent debt for goods sold; and in 1602 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in debt or assumpsit, at his option.

Neither of these steps was taken by the courts in the case of rent. There is but one reported case of a successful *indebitatus assumpsit* for rent before the Statute 11 Geo. II. c. 19, § 14; and in that case the reporter adds: "Note, there was not any exception taken, that the *assumpsit* is to pay a sum for rent; which is a real and special duty, as strong as upon a specialty; and in such case this action lies not, without some other special cause of promise."² This note is confirmed by several cases in which the plaintiff failed upon such a count as well when there was a subsequent express promise³ as where there was no such promise.⁴

¹ Reprinted by permission from "Select Essays in Anglo-American Legal History," vol. iii, p. 299.

² *Slack v. Bowsal* (B. R. 1623), Cro. Jac. 668.

³ *Green v. Harrington* (C. B. 1619), 1 Roll. Abr. 8, pl. 5, Hob. 24, Hutt. 34, Brownl. 14, s. c.; *Munday v. Baily* (B. R. 1647), Al. 29, Anon. Sty. 53, s. c.; *Ayre v. Sils* (B. R. 1648), Sty. 131; *Shuttleworth v. Garrett* (B. R. 1688), Comb. 151, per HOLT, C. J.

⁴ *Reade v. Johnson* (C. B. 1591), Cro. El. 242, 1 Leon. 155, s. c.; *Neck v. Gubb* (B. R. 1617), 1 Vin. Abr. 271, pl. 1, 2; *Brett v. Read* (B. R. 1634), Cro. Car. 343, W. Jones, 329, s. c.

The chief motive for making *assumpsit* concurrent with debt for goods sold was the desire to evade the defendant's wager of law. This motive was wanting in the case of rent, for in debt for rent wager of law was not permitted.¹ Again, although *assumpsit* was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in debt. These two facts seem amply to explain the refusal of the courts to allow an *indebitatus assumpsit* for rent.

But although the landlord was not permitted to proceed upon an *indebitatus assumpsit*, he acquired, after a time, the right to sue in certain cases, in special *assumpsit*, as well as in debt. This innovation originated in the King's Bench, which, having no jurisdiction by original writ in cases of debt, was naturally inclined to extend the scope of trespass on the case, of which *assumpsit* was a branch. At first this court attempted to justify itself by construing certain agreements as not creating a rent. For example, in *Symcock v. Payn*,² the plaintiff declared that "in consideration that the plaintiff had let to the defendant certain land, the defendant promised to pay *pro firma predictæ terræ* at the year's end, £20." "All the court (absente POPHAM) held that the action was maintainable; for it is not a rent, but a sum in gross; for which he making a promise to pay it in consideration of the lease the action lies."³ This judgment was reversed in the Exchequer Chamber in accordance with earlier and later cases in the Common Bench.⁴

In the reign of Charles I. the rule was established in the King's Bench that *assumpsit* would lie concurrently with debt if, at the time of the lease, the lessee expressly promised to pay the rent. *Action v. Symonds*⁵ (1634) was the decisive case. The count was upon the defendant's promise to pay the rent in consideration that the plaintiff would demise a house to him for three years at a rent of £25 per annum. The court (except CROKE, J.) agreed that if a lease for years be made rendering rent, an action on the case lies not upon the contract, as it would upon a personal contract for sale

¹ *Reade v. Johnson*, 1 Leon. 155; *London v. Wood*, 12 Mod. 669, 681.

² Cro. El. 756, Winch. 15 s. c. cited (1621).

³ See also *Neck v. Gubb* (1617), 1 Vin. Abr. 271, pl. 3; *Dartnall v. Morgan* (1620), Cro. Jac. 598.

⁴ *Clerk v. Palady* (1598), Cro. El. 859; *White v. Shorte* (1614), 1 Roll. Abr. 7, pl. 4; *Ablain's Case* (1621), Winch. 15.

⁵ *W. Jones*, 364, Cro. Car. 414, 1 Roll. Abr. 8, pl. 10, s. c.

of a horse or other goods, but where there is an *assumpsit* in fact, besides the contract on the lease, an action on this *assumpsit* is maintainable. In the report in Rolle's Abridgment it is said: "The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for better security of payment thereof that the lessor should have his remedy by action of debt upon the reservation, or action upon this collateral promise at his election, and this being the intent at the beginning, the making of the lease though real would not toll this collateral promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the promise of payment is a thing collateral to the reservation, which will continue though the lessee assign over." This doctrine was repeatedly recognized in the King's Bench;¹ it was adopted in the Exchequer in 1664;² and was finally admitted by the Common Bench in *Johnson v. May* (1683),³ where "because this had been *vexata quæstio* the court took time to deliver their opinion, . . . and all four justices agreed that the action lay, for an express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie."

In the cases thus far considered the *assumpsit* was for the payment of a sum certain. *Assumpsit* was also admissible where the amount to be recovered was uncertain; namely, where the defendant promised to pay a reasonable compensation for the use and occupation of land.⁴ Indeed, in such a case *assumpsit* was the sole remedy, since debt would not lie for a *quantum meruit*.⁵

¹ *Potter v. Fletcher* (1633), 1 Roll. Abr. 8, pl. 7; *Rowncevall v. Lane* (1633), 1 Roll. Abr. 8, pl. 8; *Luther v. Malyn* (1638), 1 Roll. Abr. 9, pl. 11; Note (1653), Sty. 400; *Lance v. Blackman* (1655), Sty. 463; *How v. Norton* (1666), 1 Sid. 279; 2 Keb. 8, 1 Lev. 279, s. c.; *Chapman v. Southwick* (1667), 1 Lev. 205, 1 Sid. 323, 2 Keb. 182, s. c.; *Freeman v. Bowman* (1667), 2 Keb. 291; *Stroud v. Hopkins* (1674), 3 Keb. 357. See also *Falhers v. Corbret* (1733), 2 Barnard, 386, but note the error of the reporter in calling the case an *indebitatus assumpsit*.

² *Trever v. Roberts*, Hard. 366.

³ 3 Lev. 150.

⁴ *King v. Stephens*, 2 Roll. R. 435.

⁵ *Mason v. Welland* (1685), Skin. 238, 242, 3 Mod. 73, s. c.; *How v. Norton* (1666), 1 Lev. 179, 2 Keb. 8, 1 Sid. 279, s. c.; It is probable that a promise implied in fact was sufficient to support an *assumpsit* upon a *quantum meruit*. "It was allowed that an *assumpsit* lies for the value of shops hired without an express promise," per HOLT, C. J. (1701), 1 Com. Dig. *Assumpsit*, C, pl. 6.

Such was the state of the law when the Statute 11 Geo. II, c. 19, § 14, was passed, which reads as follows: "To obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held and enjoyed; and if, in evidence on the trial of such action, any parol demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered."

The "difficulties" here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be nonsuited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *indebitatus assumpsit* became concurrent with debt upon all parol demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in assumpsit as well as in debt, without proof of an independent express promise.

The other counts in *indebitatus assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-contracts, where the promise declared upon was a pure fiction. Thus, one who took another's money, by fraud or trespass, was liable upon a count for money had and received;¹ one who wrongfully compelled the plaintiff's servant to labor for him, was chargeable in assumpsit for work and labor;² and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.

But, *indebitatus assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the

¹ *Supra*, 164; Thomas v. Whip, Bull. N. P. 130; Tryon v. Baker, 7 Lana. 511, 514.

² *Supra*, 165; Stockell v. Watkins, 2 Gill & J. 326.

count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in assumpsit for use and occupation.

LECTURE XVI.

THE DISSEISIN OF CHATTELS.¹

THE readers of "The Seisin of Chattels," by Professor Maitland, in the "Law Quarterly Review" for July, 1885, were doubtless startled at the outset by the title of that admirable article. But all must have admitted at the end that the title was aptly chosen. The abundant illustrations of the learned author show conclusively that, from the days of Glanvil almost to the time of Littleton, "seisin" and "possession" were synonymous terms, and were applied alike to chattels and land. In a word, seisin was not a purely feudal notion.

Is it possible, however, to justify the title of the present article? Is it also a mistake to regard disseisin as a peculiarity of feudalism? History seems to answer these questions in the affirmative. The word "disseisin," it is true, was rarely used with reference to personalty. Only three illustrations of such use have been found,² as against the multitude of allusions to seisin of chattels noted by Professor Maitland. In substance, however, the law of disseisin was common to both realty and personalty.

A disseisor of land, it is well known, gains by his tort an estate in fee simple. "If a squatter wrongfully incloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has inclosed. He is seised, and the owner of the waste is disseised. . . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs."³ Compare with this the following, from Fitzherbert: "Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court;"⁴ or Finch's definition: "Trespas

¹ Reprinted by permission from 3 Harvard Law Review, 23, with manuscript additions by the author.

² Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Ed. II. 409.

³ Williams, Seisin, 7. See also Leach v. Jay, 9 Ch. Div. 42, 44, 45.

⁴ Fitz. Abr. Tresp. 153.

in goods is the wrongful taking of them with pretence of title, and therefore altereth the propertie of those goods.”¹ This altering of the property by a trespass is pointedly illustrated by a case from the “Book of Assizes.”² The plaintiff brought a bill of trespass for carrying off his horse and killing it. “The defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was devested out of you and vested in us, and therefore we could not kill our own horse *contra pacem*.” The bill was adjudged bad. Furthermore, incredible as it may appear, a disseisin by theft vested the property in the stolen chattel in the thief. *John v. Adam*³ was a case of replevin in the *delinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant’s hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which HERLE, C. J., answered: “Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was.” The opinion of this distinguished judge is confirmed by numerous cases in which stolen goods were forfeited by the thief, under the rule of law that gave to the Crown the chattels of felons. The goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels.⁴

¹ Finch, Law, Book III. c. 6.

² 27 Ass. pl. 64. See also Y. B. 2 Hen. IV. 12, 51. There is a legal curiosity in 2 Roll. Abr. 553 [Q] 1, 2. “If my servant, without my knowledge, put my beasts in another’s land, my servant is the trespasser and not I; because, by the voluntary putting of the animals there without my consent, he gains a special property for the time, and so for this purpose they are his animals. But, *semble*, if my wife puts my beasts in another’s land, I, myself, am trespasser, because the wife cannot gain a property from me.”

³ Y. B. 8 Ed. III. 10, 30.

⁴ Y. B. 30 & 31 Ed. I. 508, 512, 512-514, 526; Fitzh. Coron. 95, 162, 318, 319, 367, 379, 392; Fitzh. Avow. 151; Dickson’s Case, Hetl. 64. Under certain circumstances the victim of the theft might obtain restitution of the goods. But the cases cited in this note show the difficulties that must be surmounted.

These examples are sufficient to bring out the analogy between the tortious taking of chattels and the wrongful ouster from land. But in order to appreciate fully the parallel between disseisin of chattels and disseisin of land, we must consider in some detail the position of the disseisor and disseisee in each case.¹

The disseised owner of land loses, of course, with the *res* the power of present enjoyment. But this is not all. He retains, it is true, the right *in rem*; or, to use the common phrase, he has still a right of entry and a right of action.² But by an inveterate rule of our law, a right of entry and a chose in action were strictly personal rights. Neither was assignable. It follows, then, that the disseisee cannot transfer the land. In other words, as long as the disseisin continues, the disseised owner is deprived of the two characteristic features of property, — he has neither the present enjoyment nor the power of alienation.

These conclusions are fully borne out by the authorities. "The common law was," as we read in Plowden, "that he who was out of possession might not bargain, grant, or let his right or title; and if he had done it, it should have been void."³ It was not until 1845 that by statute⁴ the interest of the disseisee of land became transferable. Similar statutes have been enacted in many of our States.⁵ In a few jurisdictions the same results have been obtained by judicial legislation.⁶ But in Alabama, Connecticut, Dakota, Florida, Kentucky, Massachusetts, New York, North

¹ For the best discussion of the doctrine of disseisin of land see Maitland, "Mystery of Seisin," 2 L. Q. Rev. 481, to which the present writer is indebted for many valuable suggestions.

² Bract. f. 376 (5 Tw. Br. 456): "Poterit enim donare quis id quod habet, scilicet seisinam et jus, actionem vero hereditariam cedere non poterit alicui, ubi necesse erit petere per descensum." Co. Lit. 266 a: "And it is to be observed, that by the ancient maxime of the common law, a right of entrie or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoyded great oppression injurie and injustice. Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seisie al temps de contracts de 2 droits, si del droit de possession, et del droit del propertie. And therefore well saith Littleton, that he to whom a release of a right is made must have a freehold."

³ Partridge v. Strange, Plow. 88, per MONTAGUE, C. J. See also Doe v. Evans, 1 C. B. 717, and 1 Platt, Leases, 50. Y. B. 10 Hen. IV. 3, 3.

⁴ 8 & 9 Vict. c. 106, § 6. See Jenkins v. Jones, 9 Q. B. Div. 128.

⁵ Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, Vermont, Virginia, West Virginia, Wisconsin, Arizona, Idaho, Utah, Wyoming.

⁶ Delaware, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas.

Carolina, Rhode Island, and Tennessee, and presumably in Maryland and New Jersey, it is still the law that the grantee of a disseisee cannot maintain an action in his own name for the recovery of the land.¹

A right of entry and action is now everywhere devisable. But until 1838 in England and 1836 in Massachusetts, a disseisee had nothing that he could dispose of by will.²

If we turn now from transfers by act of the party to transfers by operation of law, we find that in the one case of bankruptcy there was a true succession to the disseisee's right to enter or sue. But this was, of course, a statutory transfer.³

There was also a succession *sub modo* in the case of death. The heir of the disseisee, so long as he continued the *persona* of the ancestor, stood in his place. But the succession to the right *in rem* was radically different from the inheritance of the *res* itself. If the heir inherited the land, he became the feudal owner of it, and therefore at his death it descended to his heir, unless otherwise disposed of by deed or will. On the other hand, if a right of entry or action came to the heir, he did not become the absolute owner of the right. He could not hold a chose in action as tenant in fee simple. The right was his only in his representative capacity. He might, of course, reduce the right in action to possession, and so become feudal owner of the land. But if he died without gaining possession, nothing passed to his heir as such. The latter must be also the heir of the disseisee, and so the new representative of his *persona*, in order to succeed to the right *in rem*.

¹ *Bernstein v. Humes* (1877), 60 Ala. 582; Conn. Rev. Stat. (1875), 354, § 15; Dak. Civil C., § 681; *Doe v. Roe* (1869), 13 Fla. 602; *Russell v. Doyle* (1886), 84 Ky. 386, 388; *Preston v. Breckinridge*, 86 Ky. 619; *Sohier v. Coffin* (1869), 101 Mass. 179; *Rawson v. Putnam* (1880), 128 Mass. 552, 554; *Webster v. Van Steenburgh* (1864), 46 Barb. 211; *Pearce v. Moore*, 114 N. Y. 256; *Murray v. Blackledge* (1874), 71 N. C. 492; *Burdick v. Burdick* (1884), 14 R. I. 574; Tenn. Code (1884), § 2446.

A release by disseisee to disseisor was not operative unless the latter was in seisin. Y. B. 8 Ed. III. 25, 20; Y. B. 9 Hen. VII. 25, 12. Gold. 162, pl. 196: "Cook, A. G. demanded this question of the Court, if there be disseisor and disseisee, and during the disseisin, the disseisee, when he had nothing but a right, levies a fine to a stranger, if by this fine the right of the disseisee be gone, and if the disseisor shall take advantage of that. POPHAM & GAWDY. Nay truly."

² 1 Jarm. Wills, 4th ed., 49; *Poor v. Robinson*, 10 Mass. 131; Mass. Rev. St. c. 62, § 2. So of a customary devise. Y. B. 39 Hen. VI. 18, 23.

³ *Smith v. Coffin*, 2 H. Bl. 444.

These two cases of death and bankruptcy were the only ones in which the disseisee's right was assignable by involuntary transfer. There was, for example, no escheat to the lord, if the disseised tenant died without heirs, or was convicted of felony. This doctrine would seem to have been strictly feudal. Only that could escheat which was capable of being held by a feudal tenure. A chose in action could not be held by such a tenure. Only the land itself could be so held. But the land, after the disseisin, was held by the disseisor. So long as his line survived, there was no "*defectus tenentis*." The death of the disseisee without heirs was, therefore, of no more interest to the lord than the death of any stranger.¹

The lord was entitled to seize the land of his villein. But if the villein had been disseised before such seizure, the lord could not enter upon the land in the possession of the disseisor, except in the name of the villein, and, after a descent cast, could not enter at all.² Nor had he any right to bring an action in the name of his villein.³

It is still the law in most of our States, as it was in England before 1833,⁴ that "if a man seised of land in fee be disseised of the same, and then take a wife and die without re-entering, she shall not have dower."⁵

The husband of a woman who was disseised before the marriage may, of course, enter upon the disseisor in his wife's name, or he may bring an action to recover the land in their joint names;⁶ but if the land is not recovered in the one way or the other before his wife's death, he must suffer for his laches. For the old rule, which denied to the husband curtesy in his wife's right of entry or action, has not lost its force on either side of the ocean.⁷ It was

¹ WALMSLEY: "As if a man be disseised, and after be outlawed, he shall not forfeit the profits of the land." Goldsb. 55, pl. 8. This principle was not maintained in its full integrity in the time of Coke. See Maitland, 2 L. Q. Rev. 486, 487, where the authorities are fully collected.

² Co. Lit. 118 b.

³ Co. Lit. 117 a.

⁴ 3 & 4 Wm. IV. c. 105.

⁵ Perk. § 366; Thompson v. Thompson, 1 Jones (N. C.), 431; 1 Washb. R. P., 5th ed., 225, 226.

⁶ "Mettons que une feme ad tittle a certain terre p voy d'act, et prist bar, le bñ serra en ceo cas quod reddat al' bar et al feme et nient al feme sole." Y. B. 4 Hen. VI. 14, 11.

⁷ 2 L. Q. Rev. 486; 1 Bishop, Mar. W., § 509; Den v. Demarest, 1 Zab. 525, 542.

applied in New York, to the husband's detriment, as recently as 1888.¹

A disseisee cannot release to a disseisor, reserving a rent charge.²

One more phase of the non-assignability of the disseisee's right of action is shown by another recent case. It was decided in Rhode Island, in 1879, in accordance with a decision by the King's Bench, in the time of James I.,³ that a disseised owner of land had nothing that could be taken on execution.⁴

The position of the disseisor of land is, in most respects, the direct opposite of that of the disseisee. The strength of each is the weakness of the other. The right of the disseisee to recover implies the liability of the disseisor, or his transferee, to lose the land. But so long as the disseisin continues, the disseisor, or his transferee, possesses all the rights incident to the ownership of an estate in fee simple. He has the *jus habendi* and the *jus disponendi*. If he is dispossessed by a stranger, he can recover possession by entry or action.⁵ If he wishes to transfer his estate in whole or in part, he may freely do so. He may sell the land,⁶ or devise it,⁷ or lease it.⁸ He may convey it with the usual limitations, *i. e.*, for life, in tail, etc.,⁹ or subject to trusts.¹⁰ His interest is subject also to the rules of involuntary transfer. Accordingly, it may descend to his heir,¹¹ escheat to his lord,¹² or be taken on execution,¹³ and

¹ *Baker v. Oakwood*, 49 Hun, 416.

² *Read v. Nash*, 1 Leon. 148.

³ *Stamere v. Amony*, 1 Roll. Abr. 888, pl. 5; *Doe v. Minthorne*, 3 Up. Can. Q. B. 423, *accord*.

⁴ *Campbell v. Point St. Works*, 12 R. I. 452; *McConnell v. Brown*, 5 Mon. 478, *accord*. By statute or judicial legislation a different rule prevails in some jurisdictions. *Doe v. Haskins*, 15 Ala. 619; *McGill v. Doe*, 9 Ind. 306; *Blanchard v. Taylor*, 7 B. Mon. 645; *Hanna v. Renfro*, 32 Miss. 125, 130; *Rogers v. Brown*, 61 Mo. 187 (*semble*); *Truax v. Thorn*, 2 Barb. 156; *Jarrett v. Tomlinson*, 3 Watts & S. 114; *Kelley v. Morgan*, 3 Yerg. 437.

⁵ *Bract*. 165 a; *Bateman v. Allen*, Cro. El. 437, 438; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

⁶ *Christy v. Alford*, 17 How. 601; *Weber v. Anderson*, 73 Ill. 439.

⁷ *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Haynes v. Boardman*, 119 Mass. 414.

⁸ 1 *Platt, Leases*, 51; Y. B. 20 Hen. VI. 20, 15.

⁹ *Board v. Board*, L. R. 9 Q. B. 48; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

¹⁰ *Hawksbee v. Hawksbee*, 11 Hare, 230.

¹¹ *Watkins, Descents*, 4th ed., 4, n. (c); *Currier v. Gale*, 9 All. 522.

¹² 2 L. Q. Rev. 487, 488.

¹³ *Sheetz v. Fitzwalter*, 5 Barr, 126; *Talbot v. Chamberlain*, 3 Paige, 219; *Murray v. Emmons*, 19 N. H. 483.

would doubtless pass to his assignee in bankruptcy. The husband of the disseisor has curtesy,¹ and the wife dower,² and a disseisin by a villein must have enured to the benefit of his lord at the latter's election. The disseisor is entitled to common (but not advowson?),³ he has presentment,⁴ may insure realty,⁵ may grant a rent charge,⁶ and may distrain for damage feasant.⁷

The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto*.⁸ This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his "usurpation."⁹ If the taking was felonious,¹⁰ the despoiled owner might bring an appeal of larceny, and, by complying with certain conditions,¹¹ obtain restitution of the stolen chattel. But a disseisor is not liable to the disseisee in assumpsit for profits received by the disseisor from the produce of land.¹² The disseisor may even maintain replevin, trover, etc., against the disseisee, for a chattel created by severance from the

¹ Colgan v. Pellew, 48 N. J. 27, 49 N. J. 694.

² Hale v. Munn, 4 Gray, 132; McEntire v. Brown, 28 Ind. 347; Randolph v. Does, 4 Miss. 205; 1 Scribner, Dower, 255, 256, 353, 354.

³ Y. B. 19 Hen. VI. 32, 66.

⁴ Y. B. 5 Ed. III. 23, 12; Y. B. 9 Ed. IV. 39, 1.

⁵ Travis v. Continental Co., 32 Mo. App. 198, 206.

⁶ Dy. 5 a, pl. 1.

⁷ Y. B. 5 Ed. III. 10, 35.

⁸ See Y. B. 5 Ed. III. 14, 5; Y. B. 33 Hen. VI. 5, 15; Y. B. 34 Hen. VI. 11, 21; Y. B. 35 Hen. VI. 2, 3; Y. B. 35 Hen. VI. 29.

⁹ 1 Nich. Britt. 57, 116. The right of self-help in general was formerly greatly restricted. The disseisee's right of entry into land was tolled after five days. If he entered afterwards, the disseisor could recover the land from him by assize of novel disseisin. Maitland, 4 L. Q. Rev. 29, 35. So the writ of ravishment of ward would lie against one entitled to the ward if he took the infant by force from the wrongful possessor. 38 Hen. III. Abr. pl. 134, Gl.; Y. B. 21 & 22 Ed. I. 554. The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem*. 4 L. Q. Rev. 31. A nuisance could be abated by act of the party injured, only if he acted immediately. Bract. f. 233; 1 Nich. Br. 403.

¹⁰ Originally any taking without right, like killing by accident, was felonious. In 1214 Roger of Stanton killed a girl by accident: "testatum est quod non per feloniam . . . et rex motus misericordie perdonavit ei mortem." 1 Sel. Pl. Crown (Selden Soc'y), 67. See also Bract. f. 155. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bract. f. 136 b.

¹¹ See cases cited in the lecture on Appeal.

¹² Bigelow v. Jones, 10 Pick. 161; Baker v. Howell, 6 S. & R. 476 (*semble*); Stockwell v. Phelps, 34 N. Y. 363.

realty during the disseisin;¹ and he is not liable to the disseisee for a chattel created by severance during the disseisin.²

But such was the rigor and hazard of these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.³ If the taking was not criminal, trespass was for generations the only remedy.⁴

Trespass, however, was a purely personal action; it sounded only in damages.⁵ The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost the *res*, but had no right *in rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken.

What became of the chattel afterwards, therefore, was no concern of the victim of the tort. Accordingly, one need not be surprised at the following charge given by BRIAN, C. J., and his com-

¹ *Brothers v. Hurdle*, 10 Ired. 490; *Branch v. Morrison*, 5 Jones (N. C.), 16, 6 Jones, 16; *Ray v. Gardner*, 82 N. C. 454; *Lehman v. Kellerman*, 65 Pa. 489 (overruling *Elliot v. Powell*, 10 Watts, 453).

² *Page v. Fowler*, 28 Cal. 605; *Martin v. Thompson*, 62 Cal. 618; *Anderson v. Hapler*, 34 Ill. 436; *Brown v. Coldwell*, 10 S. & R. 114; *Powell v. Smith*, 2 Watts, 126; *DeMott v. Hagerman*, 8 Cow. 220. *Contra*, *Morgan v. Varick*, 8 Wend. 587 (disapproved in 10 Ired. 493).

³ A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are reported during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviatio Placitorum*, twenty-five cases are given of the single year 1252-1253. We may infer that the writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass rather than by appeal, in order to avoid "*la perilouse aventure de batailles*." Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, *Placita Anglo-Normannica*, 89, 89, 98, 102, 127.

⁴ In early English law, as in primitive law in general, the principle of parsimony did not permit concurrent remedies. The lines were drawn between the different actions with great sharpness. The right to sue a trespasser in replevin and detinue was a later development, as will be explained further on.

⁵ *Mather v. Trinity Church*, 3 S. & R. 472, approved in *Harlan v. Harlan*, 15 Pa. 507, 513; *Brewer v. Fleming*, 51 Pa. 102, 115; *Pratt v. Battels*, 28 Vt. 685 (*semble*).

panions to a jury in 1486: "If one takes my horse *vi et armis* and gives it to S., or S. takes it with force and arms from him who took it from me, in this case S. is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty."¹ Brooke adds this gloss, "For the first offender has gained the property by the tort."²

The complete divestiture of the owner's property in a chattel by a disseisin explains also a distinction taken in the Year Books, which has proved a stumbling-block to commentators to the present day: "Note by FINEUX, C. J., and TREMAYLE, C. J. If I bail goods to a man and he gives them to a stranger, or sells them, if the stranger takes them without livery he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed but by the taking. But if he delivered them to the vendee or donee, then I shall not have trespass."³ At this time, although anciently the rule was otherwise, the possession of the bailee at will was treated as the possession of the bailor also. In the first case, therefore, where there was no delivery by the bailee, the stranger by taking the goods disseised the bailor and so was liable to the latter in trespass. But in the other case, where the bailee delivered the goods sold, he was the disseisor. By a single act he gained the absolute property in the goods and transferred it to the vendee, who was thus as fully beyond the reach of the disseisee as the vendee of the disseising trespasser in the earlier case before BRIAN, C. J. The peculiarity in the case of the bailment lies in the form of the disseisin. But the asportation of a chattel or the ouster from land, although the commonest, were not the only modes of disseisin. Any physical dealing with the chattel under an assumption of dominion, or, to borrow a modern word, any conversion, was a disseisin. The wrongful delivery of the goods by the bailee as vendor corresponds perfectly to a tortious feoffment by a termor. Such a feoffment was a disseisin of the

¹ Y. B. 21 Ed. IV. 74, 6. See to the same effect Bro. Abr. Ej. Cust. 8, and Tresp. 256; Y. B. 2 Ed. IV. 5, 9, per NEEDHAM, J.; Y. B. 4 Hen. VII. 5, 1; Y. B. 16 Hen. VII. 3 a, 7; Staunf. Pl. Cor. 61 a; Harris v. Blackhole, Brownl. 26.

² Bro. Abr. Tresp. 358.

³ Y. B. 21 Hen. VII. 39, 49. See also Y. B. 2 Ed. IV. 5, 9; 2 Wms. Saund. 47 c; Wright & Pollock, Possession, 169.

landlord; and the feoffor, not the feoffee, was the disseisor.¹ The act of feoffment was at once an acquisition of a tortious fee and a conveyance.²

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be traced in the expansion of the writs of replevin and detinue, and is sufficiently curious to warrant a slight digression.

Replevin was originally confined to cases of wrongful distress.³ It was also the only action in those cases, trespass not being admissible.⁴ A distrainer, unlike a disseisor, did not take the chattel under a claim of absolute dominion, but only as a security. He had not even so much possession as a bailee. If the distress was carried off by a stranger, the distrainer could not maintain trespass,⁵ in which action the goods were always laid as the goods of the plaintiff. That action belonged to the distrainee, as the one disseised. The distrainer must use either the writ of *rescous* or *de parco fracto*, in which the property in the distress was either laid in the distrainee, or not laid in any one. Trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against a custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action

¹ Bract. 161 b; Sparks Case, Cro. El. 676; Co. Lit. 57 a, n. (3); Booth, R. Act., 2d ed., 285; 2 L. Q. Rev. 488. The assize must therefore be brought against feoffor and feoffee jointly. 1 Nich. Britt. 227. A feoffment by a tenant for life was not originally a forfeiture. 1 Nich. Britt. 226; 1 Nich. Britt. 278. "A disseisin is also done by those who convey a freehold to others, where they themselves have none; and in such case the donor as well as the disseisor should be named." See also 1 Nich. Britt. 287, note in MS. N.

² The conveyance was not necessarily co-extensive with the acquisition. If the feoffment was for life the reversion was in the feoffor. Challis, R. Prop. 329. He may have action of waste. Godb. 318.

³ This passage has been substantially repeated in the lecture on Replevin, where it originally occurred.

⁴ Abr. Pl. 265, col. 2, rot. 5; 5 Rot. Par. 139 b.

⁵ Y. B. 20 Hen. VII. 1, 1; Rex v. Cotton, Park. 113, 121.

brought.¹ If, therefore, when the sheriff came to replevy goods, as if distrained, the taker claimed them as his own, the sheriff was powerless. The writ directed him to take the goods of the plaintiff, detained by the defendant. But the goods were no longer the plaintiff's; the defendant by his claim had disseised the plaintiff and made them his own. The plaintiff must abandon his action of replevin as misconceived, and proceed against the defendant, as a disseisor, by appeal of felony, or trespass.²

Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The goods were returned to him as goods wrongfully replevied, and the plaintiff, as before, was driven to his appeal or trespass.³

The law was so far changed by the judges in 1331, that if the defendant allowed the sheriff to take the goods, he could not afterwards abate the action by a claim of title.⁴

But it was still possible for the defendant to claim property before the sheriff and so arrest further action by him. To meet

¹ Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the "*contraireisite*" of the supposal of the two writs. Y. B. 8 Hen. VI. 27, 17; 22 Hen. VI. 15, 26; 14 Hen. VII. 12, 32.

² 1 Nich. Britt. 138. "If the taker or detainer admit the bailiff to view and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not villein of the deforceor, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." Compare the case of an estray. 1 Nich. Britt. 68. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony." 1 Nich. Britt. 215-216. "No person can detain from another birds or beasts *feræ naturæ*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays."

³ Y. B. 21 & 22 Ed. I. 106; Y. B. 32 & 33 Ed. I. 54. If the defendant, instead of claiming title in himself, alleged title in a third person, he could only defeat the action by proof of the fact alleged. Y. B. 32 Ed. I. 82; Y. B. 34 Ed. I. 148.

⁴ Y. B. 5 Ed. III. 3, 11. The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. See also Y. B. 21 Ed. IV. 64 a, 35, and Y. B. 26 Hen. VIII. 6, 27. There is an echo of the old law in Y. B. 7 Hen. IV. 28 b, 5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary — *credo quod non est lex*."

this difficulty, the writ *de proprietate probanda* was devised, probably in the reign of Edward III. By this writ the sheriff was directed to replevy the goods, notwithstanding the defendant's claim, if by an inquest of office the property was found in the plaintiff's favor. This finding for the plaintiff had no further effect than to justify the sheriff in replevying the goods, and thus to permit the plaintiff to go on with the replevin action just as he would have done had the defendant allowed the sheriff to take the goods.¹ Replevin thus became theoretically concurrent with trespass.² A disseisor could not thereafter gain the absolute property by his tort. A writ in trespass for carrying off and killing the plaintiff's horse was no longer assailable for repugnancy. In 1440, to a count in trespass for taking a horse, the defendant pleaded that he took it *damage feasant* to his grain, which the plaintiff had carried off. It was objected that the plea was bad, as showing on its face that the grain was the plaintiff's by the taking. But the court allowed the plea on the ground that the defendant might have brought a replevin for the grain which proved the property in him at his election.³ It became a familiar notion that the dispossessed owner might affirm the property in himself by bringing replevin, or disaffirm it by suing in trespass.⁴ In other words, there was a disseisin by election in personalty as well as in realty.

¹ Y. B. 1 Ed. IV. 9, 18.

² Y. B. 7 Hen. IV. 28 b, 5, per GASCOIGNE, C. J.; Y. B. 19 Hen. VI. 65, 5, per NEWTON, C. J.; Y. B. 2 Ed. IV. 16, 8, per DANBY, C. J.; Y. B. 6 Hen. VII. 7, 4, per BRIAN, C. J., and VAVASOR, J.; Y. B. 14 Hen. VII. 12, 22. In fact, there are no reported cases of replevin for trespass from the time of Edward III. to the present century. See Mellor v. Leather, 1 E. & B. 619. Almost at the same time that the scope of replevin was enlarged, there was a similar duplication of remedies against the disseisor of land. Originally, if we except the writ of right, the assize of novel disseisin (or writ of entry in the nature of assize), which was the counterpoint of trespass *de bonis asportatis*, was the exclusive remedy against a disseisor. Trespass *quare clausum fregit* was confined to cases of entry not amounting to an ouster. If, therefore, the defendant in a writ of trespass claimed the freehold, the writ was abated. The plaintiff must proceed against him as a disseisor by the assize. 2 Br. Note Book, 378; Abr. Pl. 132, Essex, rot. 13; Abr. Pl. 142, col. 1, rot. 9 [1253]; Abr. Pl. 262, col. 1, rot. 18 [1272]. About 1340, trespass *quare clausum* was allowed for a disseisin. Y. B. 11 & 12 Ed. III. 503-505, 517-519; Y. B. 14 Ed. III. 231.

³ Y. B. 19 Hen. VI. 65, 5.

⁴ Br. Abr. Replev. 39; Y. B. 6 Hen. VII. 8 b, 4; Y. B. 14 Hen. VII. 12, 22; Russell v. Pratt, 4 Leon. 44, 46; Bishop v. Montague, Cro. El. 824; Bagshaw v. Gaward, Yelv. 96; Coldwell's Case, Clayt. 122, pl. 215; Power v. Marshall, 1 Sid. 172; 1 Roper, H. & W., Jacob's ed., 169.

The disseisee's right *in rem*, however, was still a qualified right; for replevin was never allowed in England against a vendee or bailee of a trespasser, nor against a second trespasser.¹ It was only by the later extension of the action of detinue that a disseisee finally acquired a perfect right *in rem*. Detinue, although its object was the recovery of a specific chattel, was originally an action *ex contractu*. It was allowed only against a bailee or against a vendor, who after the sale and before delivery was in much the same position as a bailee. So essential was the element of privity at first, that in England, as upon the Continent, during the life of a bailee, he only was liable in detinue even though the chattel, either with or without the bailee's consent, were in the possession of a third person.² In counting against a possessor after the bailee's death, the bailor must connect the defendant's possession with that of the bailee, as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him.³ Afterwards, a bailor was permitted to charge a sub-bailee in detinue in the lifetime of the bailee.⁴ This action seems to have been given to a loser as early as the reign of Edward III.⁵ But it was a long time before the averment of the plaintiff's loss of his goods became a fiction. As late as 1495, the conservative BRIAN, C. J., said: "He from whom goods are taken cannot have detinue."⁶ His companion, VAVASOR, J., it is true, expressed a contrary opinion in the same case, as did ANDERSON, C. J., in *Russell v. Pratt*⁷ (1579), and the court in *Day v. Bisbitch*⁸ (1586). But it was not until 1600 that BRIAN's opinion can be said to have been finally abandoned. In that year the comparatively modern action of trover, which had already nearly supplanted detinue *sur trover*, was allowed against a trespasser; although even then two judges dissented, because by the taking "the property and possession is divested out of the plaintiff."⁹ As the averments of losing and find-

¹ *Mennie v. Blake*, 6 E. & B. 847.

² Y. B. 24 Ed. III. 41 a, 22; Y. B. 43 Ed. III. 29, 11.

³ Y. B. 16 Ed. II. 490. But see Y. B. 9 Hen. V. 14, 22.

⁴ Y. B. 11 Hen. IV. 46 b, 20; Y. B. 10 Hen. VII. 7, 14.

⁵ Y. B. 2 Ed. III. 2, 5.

⁶ Y. B. 6 Hen. VII. 9, 4. See also 1 Ch. Pl., 7th ed., 137.

⁷ 4 Leon. 44, 46.

⁸ Ow. 70.

⁹ *Bishop v. Montague*, Cro. El. 824, Cro. Jac. 50.

ing were now fictions, trover was maintainable by the disseisee against any possessor.

The disseisee's right to maintain replevin and detinue (or trover) being thus established, we have now to inquire how far the rules which were found to govern in the disseisin of land apply to the disseisin of goods.

So long as the adverse possession continues, the dispossessed owner of the chattel has, manifestly, no power of present enjoyment. Has he lost also the power of alienation? His right *in rem*, if analyzed, means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows, then, that they were not transferable. And such was the law.¹

In 1462, DANBY, C. J., and NEEDHAM, J., agreed, it is true, that a bailor whose goods had been wrongfully taken from the bailee might give them to the trespasser.² This was against the opinion of Littleton, counsel for the plaintiff, who said, "I think it is a void gift; for when S. took them from me [bailee] the property was in him and out of you [bailor]; how, then, could you give them to him?" "*Et bene dixit*," is Brooke's comment.³ The view of the two judges was taken by VAVASOR, J., also, in a like case in 1495. But one of the greatest of English judges, BRIAN, C. J., expressed himself clearly to the contrary: "The gift is void. . . . In my opinion the property is divested by the taking, and then he had only a right of property; and so the property and right of property are not all one. Then, if he has only a right, this gift is void; for one cannot give his right."⁴ Three years later he reaffirmed his opinion in the same case: "The gift is void to him who had the goods as much as it would be to a stranger, and I think a gift to a stranger is void in such a case."⁵ A disseisee of a term has nothing to sell.⁶

¹ 1 Nich. Britt. 219: "Things which are not in the seisin of another may be purchased by title of gift, and of feoffment, and also by succession, escheat, reversion, assignment of dower, hiring, borrowing, and by title of testament." 1 Nich. Br. 221: "Gift is a more general term than feoffment, for gift is applicable to all things movable and immovable, and feoffment is only of soil."

² Y. B. 2 Ed. IV. 16, 8; Perk. § 92.

³ Bro. Abr. Replev. 39.

⁴ Y. B. 10 Hen. VII. 27, 13.

⁵ Y. B. 6 Hen. VII. 9, 4.

⁶ *Ibgrave v. Lee*, Dy. 116 b, pl. 71.

In *Russell v. Pratt*¹ (1579), there is this *dictum* by MANWOOD, C. B.: "If my goods be taken from me, I cannot give them to a stranger; but if my goods come to another by trover, I may give them over to another." The law on this point is thus summarized in "Shepard's Touchstone," the first edition of which was published in 1648: "Things in action are not grantable over to strangers but in special cases. . . . And, therefore, if a man have dis-seised me of my land or taken away my goods, I may not grant over this land or these goods until I have seisin of them again. . . . And if a man take goods from me, or from another man in whose hands they are; or I buy goods of another man and suffer them in his possession, and a stranger takes them from him, it seems in these cases, I may give the goods to the trespasser, because the property of them is still in me [*i. e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or resumption by recaption.]"² The bracketed part of this extract was added in 1820 by Preston, the learned editor of the sixth edition. No later allusion to this subject has been found in the English books; but there are several American decisions which might have been given by BRIAN himself. In *McGoon v. Ankeny*³ (1850), for instance, the *ratio decidendi* was thus ex-

¹ 4 Leon. 44, 46. See also *Rosse v. Brandstide*, 2 R. & M. R. 438, 439; *Benjamin v. Bank*, 3 Camp. 417.

² *Shep. Touch.*, 6th ed., 240, 241.

³ 11 Ill. 558. To the same effect, *Murphy v. Dunham*, 38 Fed. Rep. 503 (*semble*); *Scott v. M'Alpine*, 6 Up. Can. C. P. 302; *Goodwyn v. Lloyd*, 8 Port. 237; *Brown v. Lipscomb*, 9 Port. 472; *Dunkin v. Williams*, 5 Ala. 199; *Huddleston v. Huey*, 73 Ala. 215; *Foy v. Cochran*, 88 Ala. 353, 6 S. Rep. 685. ("A right to sue for property adversely held cannot be the subject of legal transfer.") *Davis v. Herndon*, 39 Miss. 484; *Wallen v. St. Louis Co.*, 74 Mo. 521; *O'Keefe v. Kellogg*, 15 Ill. 347; *Taylor v. Turner*, 87 Ill. 296 (*semble*); *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Young v. Ferguson*, 1 Litt. 298; *Gardner v. Adams*, 12 Wend. 297; *Blount v. Mitchell*, 1 Tayl. (N. Ca.) 130; *Morgan v. Bradley*, 3 Hawks, 559; *Stedman v. Riddick*, 4 Hawks, 29; *Overton v. Williston*, 31 Pa. 155.

But see *contra*, *Tome v. Dubois*, 6 Wall. 548; *Brig Sarah Ann*, 2 Sumn. 206, 211 (*semble*); *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; *Smith v. Kennett*, 18 Mo. 154 (in this State actions shall be in name of real party in interest); *Hall v. Robinson*, 2 Comst. 296 (*semble*); *Serat v. Utica Co.*, 102 N. Y. 681; *Kimbro v. Hamilton*, 2 Swan, 190; *Lazard v. Wheeler*, 22 Cal. 139; *Doering v. Kenamore*, 86 Mo. 588.

Compare *Holly v. Huggerford*, 8 Pick. 73; *Boynton v. Willard*, 10 Pick. 166; *Carpenter v. Hale*, 8 Gray, 157, 158; *Clark v. Wilson*, 103 Mass. 219, 222.

pressed by the court: "While the property was thus held adversely, the real owner had but a right of action against the person in possession, which was not the subject of legal transfer." And the case was followed in Illinois in 1887.¹ Again we read, in *Overton v. Williston*² (1858): "If one wrongfully converts the property of another to his own use, and continues in adverse enjoyment of it, the owner cannot sell to a third person, so as to give his vendee a right of action in his own name."

Not much is to be found in the books as to one's power to dispose, by will, of chattels adversely held. It is plain, however, that before 1330 the disseisee had nothing that he could bequeath. At that time the only remedies for a wrongful taking were trespass and the appeal of felony, both of which actions died with the person wronged.³ A statute in that year gave to the executor an action to recover damages against a trespasser in like manner as the testator might have recovered if living.⁴ The executor of a distrainee or bailor could maintain replevin or detinue, as the testator had the property at his death. After these actions were allowed against a trespasser, since the right to maintain them proved property in the dispossessed owner at his election, his executor could use them as well as trespass against a trespasser.⁵ It was, however, only a right of action that the executor acquired in such a case. The chattels themselves passed to the executor only when the testator died in possession. An executor counting on his title regularly stated that the testator died seised.⁶ In abridging one case, Fitzherbert adds, "And so see that dying seised of goods is material."⁷ Finch's statement also is explicit: "All one's own chattels, real . . . or personal, but not those he is only to recover damages for, as in goods taken from him, or to be accounted for, . . . may be given away or devised by his testament."⁸

The analogy between chattels and lands in regard to the assignability of the disseisee's interest holds good also, with one exception, in the case of involuntary transfers. Thus the successor of

¹ *Erickson v. Lyon*, 26 Ill. Ap. 17.

² 31 Pa. 155, 160.

³ Staunf. Pl. Cor. 60 b; Y. B. 16 Hen. VII. 15, 14.

⁴ 4 Ed. III. c. 7.

⁵ *Russell v. Pratt*, 4 Leon. 44; *Le Mason v. Dixon*, W. Jones, 173.

⁶ Y. B. 47 Ed. III. 23, 55; *Fitz. Abr. Replic.* 70; Y. B. 7 Hen. VI. 35, 36; Y. B. 28 Hen. VI. 4, 19. See *Hudson v. Hudson*, Latch, 214.

⁷ *Fitz. Abr. Replic.* 60.

⁸ Finch, Law, Bk. 2, c. 15.

a prior had no remedy for a taking from his predecessor.¹ The bankrupt's right to recover possession of goods wrongfully taken passes by a true succession to the statutory assignee.² But it is only a chose in action that passes, not the goods themselves.³

In case of death, the administrator represents the *persona* of the intestate, as the heir stood in the place of the ancestor.

The one exception to the parallel between land and goods is the case where the dispossessed owner of a chattel died intestate, leaving no next of kin, or was convicted of felony or outlawed. His right of action vested in the Crown, in the first case as *bonum vacans*, in the others by forfeiture. The king, unlike a feudal lord claiming by escheat, was a true successor. He was also entitled to choses in action as well as to choses in possession; for the sovereign, whether as assignor or assignee, was an exception to the rule that choses in action are not assignable, unless the claim was for a battery or other personal injury. In 1335 an outlaw who had been pardoned brought an action of trespass for a battery committed before the outlawry. As a pardon did not carry with it a restoration of anything forfeited, it was objected that the claim was extinguished. But the court gave judgment for the plaintiff; SHARD (SHARSHULL, C. J.?) saying: "If this were an action for goods and chattels carried off . . . peradventure it would not be entertained; because if goods had been in the outlaw's possession, the king would have them, and for the like reason, the king should have his action against those who wrongfully took them. But here the wrong would go unpunished if the action were not allowed."⁴

The lord of a villein was entitled to the latter's chattels if he elected to claim them. But he must, at his peril, make his election before the villein was disseised. The villein's chose in action against the disseisor was not assignable.⁵

¹ Y. B. 9 Ed. IV. 34, 9.

² *Edwards v. Hooper*, 11 M. & W. 363.

³ "Where the conversion takes place before the bankruptcy, the assignees have a right of action, but have not the property in the goods." LORD ABINGER, in *Edwards v. Hooper*, 21 L. J. Ex. 304, 305. The learned Chief Baron evidently used "property" as BRIAN, C. J., did, in contradistinction to right of property.

⁴ Y. B. 29 Lib. Ass. pl. 63. See also Y. B. 6 Hen. VII. 9, 4, and 10 Hen. VII. 27, 13.

⁵ "If the beasts of my villein are taken in name of distress, I shall have a replevin, although I never seized them before, for the property is in my villein, so that suing of this replevin is a claim which vests the property in me. But it is otherwise if he who took the beasts claimed the property." Fitz. Abr. Replevin, 43. Coke, following Fitz-

There is nothing in the law of personalty corresponding to dower in land. But the husband's right to his wife's chattels may be compared with his right of curtesy in her land. As was seen, the husband of a woman who was not seised of the land during the marriage was not entitled to curtesy. So a man who married a disseisee of chattels acquired no interest therein, unless during the marriage he reduced her right *in rem* to possession by recaption or by action in their joint names. Her right of action, in other words, was no more assignable than that of the villein. Fitzherbert treated the two cases as illustrations of the same principle.¹ The doctrine was clearly stated by the court in *Wan v. Lake*.² "If the wife had been dispossessed [of the term] before marriage, and no recovery during the coverture, the representative of the wife should have the term and not the husband, because it is then a chose in action." The rule has been applied, in a number of cases, to chattels personal.³

Finally, the disseisee of a chattel, like the disseisee of land, has at common law nothing that can be taken on execution. In a valuable book published in 1888 we read: "When personal property is held adversely to its owner, his interest therein is a mere chose in action and cannot be reached by execution, unless by the provisions of some statute."⁴

The position of the disseisor of a chattel was the converse of that of the disseisee. The converter, like the disseisor of land, had the power of present enjoyment and the power of alienation. If dispossessed by a stranger he might proceed against him by

herbert, says: "If the goods of the villein be taken by a trespass, the lord shall have no replevin, because the villein had but a right." Co. Lit. 145 b.

¹ Fitz. Abr. Replevin, 43.

² Gilb. Eq. 234. See also Co. Lit. 351 a, b; 4 Vin. Abr. 53; Y. B. 20 Ed. I. 174; Milne v. Milne, 3 T. R. 627.

³ Magee v. Toland, 8 Port. 36 (*semble*); McNeil v. Arnold, 17 Ark. 154, 178 (*semble*); Fightmaster v. Beasley, 1 J. J. Marsh. 606; Duckett v. Crider, 11 B. Mon. 188, 191 (*semble*); Sallee v. Arnold, 32 Mo. 532, 540 (*semble*); Johnston v. Pasteur, Cam. & Nor. 464; Norfeit v. Harris, Cam. & Nor. 517; Armstrong v. Simonton, 2 Tayl. 266, 2 Murph. 351, s. c.; Spiers v. Alexander, 1 Hawks, 67, 70 (*semble*); Ratcliffe v. Vance, 2 Mill. Const. R. 239, 242 (*semble*); Harrison v. Valentine, 2 Call, 487, cited. See also 1 Bishop, Mar. Wom. § 71. But see *contra*, Wellborne v. Weaver, 17 Ga. 267, 270 (*semble*); Pope v. Tucker, 23 Ga. 484, 487 (*semble*).

⁴ Freeman, Executions, 2d ed., s. 112. See to the same effect, Wier v. Davis, 4 Ala. 442; Horton v. Smith, 8 Ala. 900; Doe v. Haskins, 15 Ala. 620, 622 (*semble*); Thomas v. Thomas, 2 A. K. Marsh. 430; Com. v. Abell, 6 J. J. Marsh. 476.

trespass, replevin, detinue, or trover.¹ He could sell the chattel,² or bail it.³ It would go by will to the executor or be cast by descent upon the administrator;⁴ was forfeited to the Crown for felony;⁵ and was subject to execution. A conversion by the wife, unless the property was destroyed, was necessarily to the use of the husband,⁶ as a disseisin by a villein must have profited his lord if the latter claimed it.

We have thus far considered only the resemblances between land and chattels in the matter of seisin and disseisin. But our comparison would be incomplete if attention were not called to one point of difference. One in possession of a horse or cow was seised of the chattel itself, without more. There could, therefore, be but a single seisin of it at any given moment. If, for instance, a chattel was loaned for a term, the bailee alone was seised of it. He, and he only, could be disseised of it. To this day the bailor for a term cannot maintain trespass or trover against a stranger for a disseisin of the bailee. But, on the other hand, there was no such thing as seisin of land *simpliciter*. The seisin was always qualified by the mode of possession. One was seised either *ut de feodo vel libero tenemento*, or else *ut de termino*. Accordingly, wherever there was a term there were necessarily two distinct seisins in one and the same land, at one and the same time. Both of these seisins were lost by the tortious entry of a stranger upon the land under a claim of right, and the disseisor was exposed to two actions, — the assize of novel disseisin by the freeholder, and the *ejectio firmæ* by the termor. This difference between land and chattels is obviously artificial and of feudal origin.

But if this historical sketch has been accurately drawn, the disseisin of land finds its almost perfect counterpart in the conver-

¹ Bro. Abr. Tresp. 433; Maynard v. Bassett, Cro. El. 819; Woadson v. Newton, 2 Str. 777.

² James v. Pritchard, 7 M. & W. 216; Bigelow, Estoppel, 4th ed., 489, 490; Bohannon v. Chapman, 17 Ala. 696.

³ Shelbury v. Scotsford, Yelv. 23; Bigelow, Estoppel, 490; 5 Hen. VII. 15, 5.

⁴ Norment v. Smith, 1 Humph. 46, Moffatt v. Buchanan, 11 Humph. 369, are *contra*. But these decisions seem indefensible.

⁵ Y. B. 6 Hen. VII. 9, 4.

⁶ Hodges v. Sampson, W. Jones, 443; Keyworth v. Hill, 3 B. & Ald. 685. In Tobey v. Smith, 15 Gray, 535, a count alleging a conversion by the wife of A to their use was adjudged bad on demurrer. The conversion should have been laid to the use of the husband only.

sion of chattels, notwithstanding the difference here indicated. It is still true that the doctrine of disseisin belongs not to feudalism alone, but to the general law of property. In a subsequent paper, the writer will endeavor to show that this doctrine is not a mere episode in English legal history, but that it is a living principle, founded in the nature of things, and of great practical value in the solution of many important questions.

LECTURE XVII.

THE NATURE OF OWNERSHIP.¹

IN the preceding lecture we have endeavored to show, in the light of history, that disseisin was not a feudal doctrine, but a principle of property in general, personal as well as real. Conversion of chattels, we found, differed from disseisin of land in name, but not in substance. In each case the effect of the tort was to transfer the *res* to the wrongdoer, and to cut down the interest of the party wronged to a mere right to recover the *res*. Or, as the sagacious BRIAN, C. J., put it, the one had the property, the other only the right of property.

The disseisor, whether of land or chattels, was said to have the property, for these reasons. So long as the disseisin continued he had the power of present enjoyment of the *res*; his interest, although liable to be determined at any moment by the disseisee, was as fully protected against all other assailants as the interest of an absolute owner; and, finally, his interest was freely transferable, both by his own act and by operation of law, although, of course, by reason of its precarious nature, its exchangeable value was small. The disseisee, on the other hand, was said to have a mere right of property, because, although he was entitled to recover the *res* by self-redress, or by action at law, this was his only right. The disseisin deprived him of the two conspicuous marks of perfect ownership. He could neither enjoy the land or chattel *in specie*, nor bring either of them to market. The interest of the disseisor might have little exchangeable value; but that of the disseisee had none. For, as we have seen, this interest, being a *chose* in action, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law.

Are these doctrines of the old common law accidents of English legal history, or are they founded in the nature of things? Do

¹ Reprinted by permission from "Select Essays in Anglo-American Legal History," vol. iii, p. 561.

they chiefly concern the legal antiquarian, or have they also a practical bearing upon the litigation of to-day? To answer these questions, it will be necessary, in the first place, to analyze the idea of "ownership" or "property," in the hope of working out a definition that will bear the test of application to concrete cases; and, secondly, an attempt must be made to explain the reason of the rule that *choses* in action are not assignable.

It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently, the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et reï sine conjunctio*, then, and then only, is the title completely legal."¹

A true property may, therefore, be shortly defined as possession

¹ 2 Bl. Com. 199. See also *ibid.* 196: "And, at all events, without such actual possession no title can be completely good."

coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur auter vie* is owner of the residue of the life estate. For no one during the life of *cestui que vie* can legally disturb him.

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.

There is one curious case of derivative title which may be thought to confirm in a somewhat striking manner the accuracy of the definition here suggested. If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder after a life estate in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or

extremely rare, gave the reversioner and remainderman no remedy against the life tenant. There was no action for chattels corresponding to the *formedon* in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bailment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor.¹ Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute.²

Another rule now obsolete, admits of a similar explanation. In the fourteenth century, as we have seen, a trespasser acquired the absolute property in the chattel wrongfully taken. The common law gave the dispossessed owner no remedy for its recovery. There was no assize of novel disseisin for chattels. *Replevin* was restricted to cases of wrongful distress. Detinue, originally founded upon a bailment, and afterwards extended to cases of losing and finding, was not allowed against a trespasser until about 1600. Trespass was therefore the owner's only action; but trespass sounded in damages. The trespasser's possession being inviolable, he was necessarily owner.

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it, as if it were the seller's own, the purchaser gets at law only the seisin. The original owner's title, that is, his right to recover the seisin, is not otherwise affected by the conveyance. But a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

Where the two elements of ownership are severed, as by a disseisin, and vested in two persons, either may conceivably make his defective title perfect; but the mode of accomplishing this is

¹ *Perrot v. Austin*, Cro. El. 222; *Cover v. Stem*, 67 Md. 449; See *Rice v. Hartman*, 84 Va. 251.

² After a time the chancellors gave relief by compelling life tenants to give bonds that the reversioners and remaindermen should have the chattels. *Warman v. Seaman*, Freem. C. C. 306, 307; *Howard v. Duke of Norfolk*, 2 Sw. 464; 1 Fonb. Eq. 213, n.; *Cole v. Moore*, Moo. 806. And now either in equity or at law the reversioners and remaindermen are amply protected. The learning on this point, together with a full citation of the authorities, may be found in *Gray, Perpetuities*, §§ 78-98.

different in the two cases. The disseisee may regain his lost possession by entry or recaption, by action at law, or by a voluntary surrender on the part of the disseisor. In each of these ways his title becomes complete, and is the result of a transfer, voluntary or involuntary, of the physical *res*.

The perfection of the title of the disseisor, on the other hand, is not accomplished through a transfer to him of the disseisee's right to recover possession. In the very nature of things, this right of the dispossessed owner cannot be conveyed to the wrongful possessor. It would be absurd to speak of such possessor acquiring a right to recover possession from himself, which would be the necessary consequence of the supposed transfer. But the disseisee's right, although not transferable, may, nevertheless, be extinguished. And since, by its extinguishment, the possession of the disseisor becomes legally unassailable, the latter's ownership is thereby complete.

The extinguishment may come about in divers ways: —

(1.) *By a release*. "Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor and the uniting the right to the possession completes the title of the releasee."¹ In feoffments and grants it was a rule that the word "heirs" was essential to the creation of an estate of inheritance. But, as Coke tells us, "When a bare right is released, as when the disseisee releases to the disseisor all his right, he need not speake of his heires."² This distinction would seem to be due to the fact that a release operates, not as a true conveyance, but by way of extinguishment.

(2.) *By marriage*. As we have seen in the preceding lecture, if a woman, who was dispossessed of her land or chattels, married, her right of action against the wrongdoer not being assignable, did not pass to her husband. If, therefore, she died before possession was regained, the husband had no curtesy in the land, and the right to recover the chattel passed to her representative. But if the dispossessed woman can be imagined to marry the dispossessor, it seems clear, although no authority has been found,³ that in that highly improbable case the marriage, by suspending and

¹ Co. Lit. 274 a, Butler's note [237].

² Co. Lit. 9 b.

³ A woman by marrying her bailee or debtor extinguished the bailment or debt. Y. B. 21 Hen. VII. 29, 4.

consequently extinguishing her right of action, would give the husband a fee simple in the land and absolute ownership of the chattel.

(3.) *By death.* If a man were disseised by his eldest son and died, the son and heir would be complete owner; for death would have removed the only person in the world who could legally assail his possession. The law of trusts furnishes another illustration. The right of a *cestui que trust*, it is true, is not a right *in rem*, but a right *in personam*. Nevertheless it relates to a specific *res*, and so long as it exists, practically deprives the trustee of the benefits of ownership. If this right of the *cestui que trust* could be annihilated, the trustee would be owner in substance as well as in name. This annihilation occurred in England, if the *cestui que trust* of land died intestate and without heirs, inasmuch as a trust of land did not escheat to the Crown or other feudal lord.¹ The trust was said to sink for the benefit of the trustee, and for the obvious reason that no one could call him to account.

(4.) *By lapse of time.* Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.² As a matter of legal reason-

¹ *Burgess v. Wheate*, 1 W. Bl. 123; *Ames Cas. on Trusts*, 501, 511, n. 1. By St. 47 and 48 Vict. c. 71, § 4, equitable interests do now escheat. It has been urged by Mr. F. W. Hardman, with great ability, that a trust in land ought to have been held to pass to the sovereign after the analogy of *bona vacantia*. 4 L. Q. Rev. 330-336. And this view has met with favor in this country. *Johnston v. Spicer*, 107 N. Y. 185; *Ames, Cas. on Trusts*, 511, n. 1.

² The writer regrets to find himself in discord upon this point with the opinion expressed incidentally by Professor Langdell, in his *Summary of Equity Pleading*, 2d ed., § 122.

ing this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione per patientiam et negligentiam veri domini.*"¹

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title."² LORD MANSFIELD may also be cited: "Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."³

Sir THOMAS PLUMMER, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity."⁴

There are, to be sure, occasional *dicta* to the effect that the statute of James I. only barred the remedy without extinguishing the right, and that the right which would support a writ of right

¹ Bract. 52 a.

² 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, Conveyancing, 5th ed., 270; Stokes v. Berry, 2 Salk. 421, per LORD HOLT. Butler's note in Co. Lit. 239 is as follows: "But if A. permits the possession to be withheld from him [by B.] beyond a certain period of time, without claiming it . . . B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right . . . so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete."

³ Taylor v. Horde, 1 Burr. 60, 119. See Leffingwell v. Warren, 2 Black, 599, 605, per SWAYNE, J.; Davis v. Mills, 194 U. S. 451, 456-457, per HOLMES, J.; Moore v. Luce, 29 Pa. 260, 262, per LEWIS, C. J.

⁴ Cholmondeley v. Clinton, 2 Jac. & W. 1, 156.

or other *droit* action never died. An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.¹ Fortunately these *dicta* have had no other effect than to bring some unnecessary confusion of ideas into this subject. The logic of facts has proved irresistible in the decision of concrete cases. The courts have uniformly held that a title gained by lapse of time is not to be distinguished from a title acquired by grant.² Thus, if the prescriptive owner desires to transfer his title, he must observe the usual formalities of a conveyance; he cannot revest the title in the disseisee by disclaiming the benefit of the statute.³ His title is so perfect

¹ "The idea that the title to property can survive the loss of every remedy known to the law for reducing it to possession and enjoyment would seem to have but small support in logic or reason." Per O'BRIEN, J., in *Baker v. Oakwood*, 123 N. Y. 16, 26. The notion that a debt survives the extinction of all remedies for its enforcement is peculiar to English and American law, and even in those systems cannot fairly be deduced from the authorities commonly cited in its support. It is not because the debt continues, that a new promise to pay a debt barred by the statute is binding; but because the extinguishment of the creditor's right is not equivalent to performance by the debtor. The moral duty to pay for the *quid pro quo* remains, and is sufficient to support the new promise. It is because this moral duty remains that the debtor, though discharged from all actions, cannot, without payment, recover any security that the creditor may hold. Again, it has been urged that the statute affects the remedy, but not the right, because the lapse of the statutory time in the jurisdiction of the debtor is no bar to an action in another jurisdiction. But this rule admits of another explanation. A debt being transitory, a creditor has an option, from the moment of its creation, to sue the debtor wherever he can find him. The expiration of the period of limitation in one jurisdiction, before he exercises his option, has no effect upon his right to sue elsewhere. But it extinguishes his right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revise it. *Cooley, Const. Lim.* 365. The case of *Campbell v. Holt*, 115 U. S. 620, *contra*, stands almost alone.

² This statement is too sweeping. A conveyance by A. of Blackacre wholly surrounded by other land of A., would give the grantor by implication a way of necessity across the surrounding land. But a disseisor of Blackacre acquires no way of necessity. *Wilkes v. Greenway*, 6 T. L. R. 449; *McLaren v. Strachan*, 23 Ont. L. Rev. 120 n.

³ *Sanders v. Sanders*, 19 Ch. Div. 373; *Hobbs v. Wade*, 36 Ch. Div. 553; *Jack v. Walsh*, 4 Ir. L. R. 254; *Doe v. Henderson*, 3 Up. Can. Q. B. 486; *McIntyre v. Canada Co.*, 18 Grant, Ch. 367; *Bird v. Lisbros*, 9 Cal. 1, 5 (*semble*); *School District v. Benson*, 31 Me. 381; *Austin v. Bailey*, 37 Vt. 219; *Hodges v. Eddy*, 41 Vt. 485; *Kibble v. Fairthorne*, [1895] 1 Ch. 219; *Parham v. Dedman*, 66 Ark. 26; *Shirey v. Whitlow*, 80 Ark. 444; *Hudson v. Stillwell*, 80 Ark. 575; *Brown v. Cockerell*, 33 Ala. 38; *Todd v. Kauffman*, 19 Dist. Col. 304; *Ill. Co. v. Wakefield*, 173 Ill. 565; *Riggs v. Riley*, 113 Ind. 208; *Bunce v. Bidwell*, 43 Mich. 542; *Sage v. Rudnick*, 67 Minn. 362; *Allen v. Mansfield*, 82 Mo. 688; *Sailor v. Hertzogg*, 2 Barr. 182, 184; *Bradford v. Guthrie*, 4 Brewst. (Pa.) 351, 361; *Bruce v. Washington*, 80 Tex. 368; *Hughes v. Graves*, 39 Vt. 359, 365; *McDonald v. McIntosh*, 8 Up. Can. Q. B. 388.

that a court of equity will compel its acceptance by a purchaser.¹ A repeal of the statute will not affect his title.² If dispossessed by the disseisee after the statute has run, he may enforce his right of entry or action against him as he might against any other intruder.³ He may even maintain a bill in equity to remove the cloud upon his title, created by the documentary title of the original owner.⁴ If sued

¹ *Scott v. Nixon*, 3 Dr. & War. 388, 405; *Sands v. Thompson*, 22 Ch. Div. 614; *Games v. Bonnor*, 54 L. J. Ch. 517; *Cox v. Cox*, 18 Dist. Col. 1; *Crowell v. Druley*, 19 Ill. Ap. 509; *Tewksbury v. Howard*, 138 Ind. 103; *Foreman v. Wolf* (Md. 1894), 29 Atl. 837; *Trustees v. Hilken*, 84 Md. 170; *Erdman v. Corse*, 87 Md. 506; *Regents v. Calvary Church*, 104 Md. 635; *Dickerson v. Kirk*, 105 Md. 638; *Ballou v. Sherwood*, 32 Neb. 667; *Barnard v. Brown*, 112 Mich. 452; *Shriver v. Shriver*, 86 N. Y. 575; *Ottinger v. Strasburger*, 33 Hun, 466, aff'd 102 N. Y. 692; *O'Connor v. Huggins*, 113 N. Y. 511; *Pell v. Pell*, 65 N. Y. App. Div. 388; *Pratt v. Eby*, 67 Pa. 396; *Shober v. Dutton*, 6 Phila. 185.

² *Campbell v. Holt*, 115 U. S. 620, 622 (*semble*); *Trim v. McPherson*, 7 Cold. 15; *Grigsby v. Peak*, 57 Tex. 142; *Sprecker v. Wakely*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245; *Hall v. Webb*, 21 W. Va. 318; *McEldowney v. Wyatt*, 44 W. Va. 711.

³ *Brassington v. Llewellyn*, 27 L. J. Ex. 297; *Bryan v. Cowdal*, 21 W. R. 693; *Rains v. Buxton*, 14 Ch. D. 537; *Groome v. Blake*, 8 Ir. C. L. 428; *Mulholland v. Conklin*, 22 Up. Can. C. P. 372; *Johnston v. Oliver*, 3 Ont. R. 26; *Holtzapple v. Phillibaum*, 4 Wash. 356; *Barclay v. Smith*, 66 Ala. 230 (*semble*); *Jacks v. Chaffin*, 34 Ark. 534; *Clarke v. Gilbert*, 39 Conn. 94; *Doe v. Lancaster*, 5 Ga. 39; *McDuffee v. Sinnott*, 119 Ill. 449; *Brown v. Anderson*, 90 Ind. 93; *Chiles v. Jones*, 4 Dana, 479; *Armstrong v. Risteau*, 5 Md. 256; *Littlefield v. Boston*, 146 Mass. 268; *Jones v. Brandon*, 59 Miss. 585; *Biddle v. Mellon*, 13 Mo. 335; *Jackson v. Oltz*, 8 Wend. 440; *Pace v. Staton*, 4 Ired. 32; *Pederick v. Searle*, 5 S. & R. 236; *Abel v. Hutto*, 8 Rich. 42; *Stokes v. Berry*, 2 Salk. 421; *Midland Co. v. Wright*, [1901] 1 Ch. 735 (injunction against disseisee); *Hackett v. Marmet Co.*, 52 Fed. 268; *So. Dist. v. Blakeslee*, 13 Conn. 227; *Montgomery v. Robinson*, 4 Del. Ch. 490 (injunction against disseisee); *Paullin v. Hale*, 40 Ill. 274; *McDuffee v. Sinnott*, 119 Ill. 449; *Faloon v. Simshauser*, 130 Ill. 649; *Donahue v. Ill. Co.*, 165 Ill. 640; *Bradley v. Lightcap*, 202 Ill. 154; *Armear v. Richards*, 112 Ia. 657 (injunction against disseisee); *Roberts v. Sanders*, 3 A. K. Marsh. 28; *Doe v. Fletcher*, 37 Md. 430; *Watemeyer v. Baughman*, 63 Md. 200; *Schock v. Falls City*, 31 Neb. 599 (injunction against disseisee); *City v. White*, 50 Neb. 516, 70 N. W. 50; *Rice v. Kelly*, 81 Neb. 92, 115 N. W. 625; *Davock v. Nealon*, 58 N. J. 21; *Spottiswoode v. Morris Co.*, 61 N. J. 322, 63 N. J. 667; *Jackson v. Dieffen-dorf*, 3 Johns. 269; *Barnes v. Light*, 116 N. Y. 34; *Eldridge v. Kenning*, 35 N. Y. St. Rep. 190 (injunction against disseisee); *Schall v. Williams Co.*, 35 Pa. 191, 204; *MacGregor v. Thompson*, 7 Tex. Civ. App. 32.

⁴ *Low v. Morrison*, 14 Grant, Ch. 192; *Pendleton v. Alexander*, 8 Cranch. 463; *Arrington v. Liscom*, 34 Cal. 365; *Tracy v. Newton*, 57 Iowa, 210; *Rayner v. Lee*, 20 Mich. 384; *Stettinische v. Lamb*, 18 Neb. 619; *Watson v. Jeffrey*, 39 N. J. Eq. 62; *Parker v. Metzger*, 12 Oreg. 407; *Sharon v. Tucker*, 144 U. S. 533; *Marston v. Rowe*, 39 Ala. 722; *Van Etten v. Daughtery*, 83 Ark. 534; *Echols v. Hubbard*, 90 Ala. 309; *Normant v. Eureka Co.*, 98 Ala. 181; *Torrent Co. v. Mobile*, 101 Ala. 559; *McCormack v. Silsby*, 82 Cal. 72; *Baker v. Clark*, 128 Cal. 181; *Roberson v. Downing Co.*, 120 Ga.

by the disseisee he may plead in denial of the plaintiff's title.¹ The English cases cited in support of these propositions, it may be urged, were decided under St. 3 and 4 Wm. IV. c. 27, the 34th section of which expressly extinguishes the title of the original owner at the end of the time limited. But inasmuch as the American cases cited were decided under statutes substantially like St. 21 James I. c. 16, which contains no allusion to any extinguishment of title, the 34th section referred to may fairly be regarded as pure surplusage.

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.² The vice being thus removed, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. Accordingly, the adverse possessor cannot restore the title to the original owner by waiving the benefit of the statute.³

833; *Bellefontaine Co. v. Niedringhaus*, 181 Ill. 426; *Wilson v. Campbell*, 119 Ind. 286; *Indep. Dist. v. Fagen*, 94 Ia. 676; *Severson v. Gremm*, 124 Ia. 729; *Gardner v. Terry*, 99 Mo. 523; *McRee v. Gardner*, 131 Mo. 599 (*semble*); *Peterson v. Townsend*, 30 Neb. 373, 46 N. W. 526; *Nash v. Land Co.*, 15 N. Dak. 566; *Moody v. Holcomb*, 26 Tex. 714; *Bellingham v. Dibble*, 4 Wash. 764; *Pitman v. Hill*, 117 Wis. 318; *Clithero v. Fenner*, 122 Wis. 356.

¹ *Nelson v. Brodhack*, 44 Mo. 596; *Fulkerson v. Mitchell*, 82 Mo. 13; *Hill v. Bailey*, 8 Mo. App. 85; *Staley v. Housel*, 35 Neb. 160; *Murray v. Romine*, 60 Neb. 94; *Link v. Campbell*, 72 Neb. 310, 104 N. W. 939; *Freeman v. Sprague*, 82 N. C. 366; *Cheat-ham v. Young*, 113 N. C. 161. But see *Ten Eyck v. Witbeck*, 55 N. Y. App. Div. 165; *Udell v. Stearns*, 125 N. Y. App. Div. 196.

² *Ex parte Drake*, 5 Ch. Div. 866, 868; *Chapin v. Freeland*, 142 Mass. 383; cases cited p. 202, n. 2. "In order to make the title perfect, there must have been something in the nature of an adverse possession for more than six years; then, indeed, the party would have a right to the chattel," per POLLOCK, C. B., in *Plant v. Cotterill*, 5 H. & N. 430, 439-440. See also *Davis v. Mills*, 194 U. S. 451, 457, per HOLMES, J.

According to LITTLETON, a right of entry or recaption is not extinguished by a release of all actions; and in *Put v. Rawsterne*, Skin. 48, 57, 2 Mod. 318, there is a *dictum* that the right of recaption is not lost, although all rights of action are merged in a judgment in trover. It may be that LITTLETON's interpretation would be followed to-day, although it certainly savors of scholasticism. But the *dictum* in *Put v. Rawsterne*, surely, cannot be law.

³ *Morris v. Lyon*, 84 Va. 331.

His title is not affected by a repeal of the statute.¹ If dispossessed by the original owner, he may maintain detinue or replevin against the latter, as he might against any stranger.² He may have an injunction restraining the removal of the chattel by the original owner.³ A title gained by lapse of time in one State is good everywhere.⁴ If insolvent, he cannot surrender the chattel to the original owner.⁵ If sued by the original owner, he may plead in denial of the plaintiff's title.⁶

¹ *Campbell v. Holt*, 115 U. S. 623 (*semble*); *Jones v. Jones*, 18 Ala. 245, 253 (*semble*); *Davis v. Minor*, 2 Miss. 183, 189-190 (*semble*); *Power v. Telford*, 60 Miss. 195 (*semble*); *Moore v. State*, 43 N. J. 203, 206 (*semble*); *Yancy v. Yancy*, 5 Heisk. 353; *Brown v. Parker*, 28 Wis. 21, 28 (*semble*).

² *Brent v. Chapman*, 5 Cranch, 358; *Shelby v. Guy*, 11 Wheat. 361 (*semble*); *Howell v. Hair*, 15 Ala. 194; *Sadler v. Sadler*, 16 Ark. 628; *Wynn v. Lee*, 5 Ga. 217 (*semble*); *Robbins v. Sackett*, 23 Kan. 301; *Stanley v. Earl*, 5 Litt. 281; *Smart v. Baugh*, 3 J. J. Marsh. 363 (*semble*); *Clark v. Slaughter*, 34 Miss. 65; *Chapin v. Free-land*, 142 Mass. 383 (FIELD, J., diss.); *Baker v. Chase*, 55 N. H. 61, 63 (*semble*); *Powell v. Powell*, 1 Dev. & B. Eq. 379; *Call v. Ellis*, 10 Ired. 250; *Cockfield v. Hudson*, 1 Brev. 311; *Gregg v. Bigham*, 1 Hill (S. C.), 299; *Simon v. Fox*, 12 Rich. 392; *McGowan v. Reid*, 27 S. C. 262, 267 (*semble*); *Kegler v. Miles*, Mart. & Y. 426; *Partee v. Badget*, 4 Yerg. 174; *Wheaton v. Weld*, 9 Humph. 773; *Winburn v. Cochran*, 9 Tex. 123; *Connor v. Hawkins*, 71 Tex. 582; *Preston v. Briggs*, 16 Vt. 124, 130; *Newby v. Blakey*, 3 Hen. & M. 57; *Hicks v. Fluit*, 21 Ark. 463; *Currier v. Studley*, 159 Mass. 17; *Pate v. Hazell*, 107 N. C. 189 (*semble*); *Ingram v. Porter*, 4 McC. 198; *Waters v. Barton*, 1 Cold. 450; *Bowyer v. Robertson* (Tex. Civ. App. 1895), 29 S. W. 916.

³ *Altoona Co. v. R. R. Co.*, 203 Pa. 102, 52 Atl. 6.

⁴ *Shelby v. Guy*, 11 Wheat. 361; *Goodman v. Munks*, 8 Port. 84, 94-95; *Howell v. Hair*, 15 Ala. 194 (*semble*); *Newcombe v. Leavitt*, 22 Ala. 631; *Wynn v. Lee*, 5 Ga. 217; *Broh v. Jenkins*, 9 Mart. 526 (*semble*); *Davis v. Minor*, 2 Miss. 183 (*semble*); *Fears v. Sykes*, 35 Miss. 633; *Moore v. State*, 43 N. J. 203, 205, 208 (*semble*); *Alexander v. Burnet*, 5 Rich. 189 (*semble*); *Sprecker v. Wakeley*, 11 Wis. 432, 440 (*semble*); *Cargile v. Harrison*, 9 B. Mon. 518, 521 (*semble*); *Waters v. Barton*, 1 Cold. 450.

⁵ *Gath v. Barksdale*, 5 Munf. 101.

⁶ *Campbell v. Holt*, 115 U. S. 623 (*semble*); *Smart v. Baugh*, 3 J. J. Marsh. 363; *Smart v. Johnson*, 3 J. J. Marsh. 373; *Duckett v. Crider*, 11 B. Mon. 188; *Elam v. Bass*, 4 Munf. 301; *Lay v. Lawson*, 23 Ala. 377; *Traum v. Keiffer*, 31 Ala. 136.

The general rule is asserted also in *Bryan v. Weems*, 29 Ala. 423; *Pryor v. Ryburn*, 16 Ark. 671; *Crabtree v. McDaniel*, 17 Ark. 222; *Machin v. Thompson*, 17 Ark. 199; *Blackburn v. Morton*, 18 Ark. 384; *Morine v. Wilson*, 19 Ark. 520; *Ewell v. Tidwell*, 20 Ark. 136; *Spencer v. McDonald*, 22 Ark. 466; *Curtis v. Daniel*, 23 Ark. 362; *Paschal v. Davis*, 3 Ga. 256, 265; *Wellborn v. Weaver*, 17 Ga. 267; *Thompson v. Caldwell*, 3 Litt. 136; *Orr v. Pickett*, 3 J. J. Marsh. 269, 278; *Martin v. Dunn*, 30 Miss. 264, 268; *Hardeson v. Hays*, 4 Yerg. 507; *Prince v. Broach*, 5 Sneed, 318; *Kirkman v. Phillips*, 7 Heisk. 222; *Munson v. Hollowell*, 26 Tex. 475; *Merrill v. Bullard*, 59 Vt. 389; *Garland v. Enos*, 4 Munf. 504; *Harrison v. Pool*, 16 Ala. 167, 174; *McCombs v. Guild*, 9 Lea, 81; *Thornburg v. Bowen*, 37 W. Va. 538.

Goodwin v. Morris, 9 Oreg. 322, is a solitary decision to the contrary. There are strong *dicta* to the contrary in *Miller v. Dell*, [1891] 1 Q. B. 468.

In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute was complete. But before that time the wrongdoer may have parted with the *res* by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrongdoer.

If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the statute of limitations is concerned, only this difference: the title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter. Let us suppose, for example, that B. disseises A., occupies for ten years, and then conveys to C. If the statutory period be assumed to be twenty years, B.'s title at the time of the transfer is good against every one except A., but is limited by the latter's right to recover possession at any time during the ensuing ten years. B.'s title, thus qualified, passes to C. At the end of the second ten years the qualification vanishes, and C. is complete owner. This, it is believed, is the rationale of the oft-repeated rule that the times of successive adverse holders, standing in privity with each other, may be tacked together to make up the period of limitation. In regard to land, this rule of tacking is all but universal.¹

¹ *Ancestor and heir.* Doe v. Lawley, 13 Q. B. 954; Clarke v. Clarke, Ir. R. 2 C. L. 395; Currier v. Gale, 9 All. 522; Duren v. Kee, 26 S. C. 224; Doe v. Fletcher, 37 Md. 430; Wickes v. Wickes, 98 Md. 307; Alexander v. Gibbon, 118 N. C. 796; Epperson v. Stansill, 64 S. C. 485; Bardin v. Commercial Co., 82 S. C. 358, 64 S. E. 165; Corder v. Dolin, 4 Baxt. 238.

Devisor and devisee. Newcomb v. Stebbins, 9 Met. 545; Shaw v. Nicholay, 30 Mo. 99; Caston v. Caston, 2 Rich. Eq. 1; Lantry v. Wolff, 49 Neb. 374. But see *contra*, Burnett v. Crawford, 50 S. C. 161.

Vendor and vendee. Simmons v. Shipman, 15 Ont. R. 301; Christy v. Alford, 17 How. 601; Riggs v. Fuller, 54 Ala. 141; Smith v. Chapin, 31 Conn. 530; Weber v. Anderson, 73 Ill. 439; Durel v. Tennison, 31 La. An. 538; Chadbourne v. Swan, 40 Me. 260; Hanson v. Johnson, 62 Md. 25; Crispen v. Hannavan, 50 Mo. 536; McNeely v. Langan, 22 Oh. St. 32; Overfield v. Christie, 7 S. & R. 173; Clarke v. Chase, 5 Sneed, 636; Cook v. Dennis, 61 Tex. 246; Day v. Wilder, 47 Vt. 583. But see *contra*, King v. Smith, Rice, 10; Johnson v. Cobb, 29 S. C. 372; Shuffleton v. Nelson, 2 Sawy. 540; Holt v. Adams, 121 Ala. 664; Memphis Co. v. Organ, 67 Ark. 84; Robinson v. Nordman, 75 Ark. 593; Montgomery v. Robinson, 4 Del. Ch. 490; Hanson v. Johnson, 62 Md. 25; Vandall v. St. Martin, 42 Minn. 163; Menkens v. Blumenthal, 27 Mo. 198; Murray v. Romine, 60 Neb. 94; Oldig v. Fisk, 53 Neb. 156, 95 N. W. 492; Rice v. Kelly, 81 Neb. 92, 115 N. W. 625; Davock v. Nealon, 58 N. J. 21; Vance v. Wood, 22 Ore. 77; Wheeler v. Taylor, 32 Ore. 421; West v. Edwards, 41 Ore. 609; Cunningham

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land.¹ A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the dispossessed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted, if there had been no sale. In other words, an innocent purchaser from a wrongdoer would be in a worse position than the wrongdoer himself, — a conclusion as shocking in point of justice as it would be anomalous in law.

It remains to consider the operation of the statute when the disseisor or converter has been, in turn, dispossessed by a wrongdoer. A change of possession accomplished in this mode has no more effect upon the right of the original owner than a change of possession by means of a transfer. But the rights and relations of the two successive adverse possessors are fundamentally different in the two cases. Let us suppose, as before, that B. disseises A., and occupies for ten years, and then, instead of selling to C., is disseised by C., who occupies for another ten years. At the moment of the second disseisin B.'s possession is qualified by A.'s right to recover the *res* at any time during the next ten years. After the disseisin C.'s possession would, of course, be subject to the same qualification. But B. had as against the rest of the world the two elements of per-

v. Patton, 6 Barr. 355; *Hughes v. Pickering*, 14 Pa. 297; *Covert v. Pittsburg Co.*, 204 Pa. 341; *Johnson v. Simpson*, 22 Tex. Civ. App. 290; *Ill. Co. v. Budzisz*, 106 Wis. 499; *Ill. Co. v. Jeka*, 119 Wis. 122; *Closuit v. Arpin Co.*, 130 Wis. 258; *Mielke v. Dodge*, 135 Wis. 388, 115 N. W. 1099; *Ill. Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550.

Lessor and lessee. *Melvin v. Proprietors*, 5 Met. 15; *Sherin v. Brackett*, 36 Minn. 152.

Judgment debtor and execution purchaser. *Searcy v. Reardon*, 1 A. K. Marsh. 3; *Chouquette v. Barada*, 23 Mo. 331; *Scheetz v. Fitzwater*, 5 Barr. 126.

Wife and tenant by curtesy. *Colgan v. Pellens*, 48 N. J. 27, 49 N. J. 694.

See further, *McEntie v. Brown*, 28 Ind. 347; *Haynes v. Boardman*, 119 Mass. 414; *St. Louis v. Gorman*, 29 Mo. 593; *Hickman v. Link*, 97 Mo. 482.

¹ *Bohannon v. Chapman*, 17 Ala. 696; *Newcombe v. Leavitt*, 22 Ala. 631; *Shute v. Wade*, 5 Yerg. 1, 12 (*semble*); *Norment v. Smith*, 1 Humph. 46, 48 (*semble*); *Hicks v. Fluit*, 21 Ark. 463; *Dragoo v. Cooper*, 9 Bush. 629; *Thornburg v. Bowen*, 37 W. Va. 538 (but see *Wells v. Ragland*, 1 Swan, 501; *Hobbs v. Ballard*, 5 Sneed, 395), *accord*.

Tacking, not being allowed in regard to land in South Carolina, is naturally not permitted there in the case of chattels. *Beadle v. Hunter*, 3 Strob. 331; *Alexander v. Burnet*, 5 Rich. 189; *Dillard v. Philson*, 5 Strob. 213 (*semble*).

fect ownership, — possession and the unlimited right of possession. C. by disseising B. severs these two elements of B.'s title, good against every one but A., in the same way that B. by his tort had previously divided A.'s ownership, good against every one without exception. Just as by the original disseisin B. acquired the *res* subject to A.'s right of entry or action for twenty years, so by the second disseisin C. acquires the *res* subject to B.'s right of entry or action for an equal period. There would be, therefore, two defects in C.'s title; namely, A.'s right to recover the *res* for ten years, and B.'s right to recover it for twenty years from the time of the second disseisin. If A. fails to assert his claim during this ten years, his right is gone forever. One of the defects of C.'s title is blotted out. He becomes owner against every one but B. He may, accordingly, at any time thereafter defend successfully an action brought by A., or if forcibly dispossessed by A., he may recover the *res* from him by entry or action as he might against any other dispossessor, B. alone excepted. In other words, C., although a disseisor, and therefore not in privity with B., may tack the time of B.'s adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States.¹ There are, however, some decisions and a widespread opinion to the contrary in this country.² But

¹ Doe v. Carter, 9 Q. B. 863; Willis v. Howe, [1893] 2 Ch. 545, 553; Kipp v. Synod, 33 Up. Can. Q. B. 220; Fanning v. Willcox, 3 Day, 258; Smith v. Chapin, 31 Conn. 530 (*semble*); Shannon v. Kinny, 1 A. K. Marsh. 3; Hord v. Walton, 2 A. K. Marsh. 620; Wishart v. McKnight, 178 Mass. 356 (explaining the misunderstood case of Sawyer v. Kendall, cited in the next note); Fitzrandolph v. Norman, 2 Tayl. 131; Candler v. Lunsford, 4 Dev. & B. 407; Davis v. McArthur, 78 N. C. 357; Cowles v. Hall, 90 N. C. 330. See also 1 Dart. V. & P., 6th ed., 464-466; Pollock and Wright, Possession, 23.

² San Francisco v. Fulde, 37 Cal. 349; Doe v. Brown, 4 Ind. 143 (*semble*); Sawyer v. Kendall, 10 Cush. 241; Witt v. St. Paul Co., 38 Minn. 122 (*semble*); Locke v. Whitney, 63 N. H. 597 (*semble*); Jackson v. Leonard, 9 Cow. 653; Moore v. Collishaw, 10 Barr, 224; Shrack v. Zubler, 34 Pa. 38; Erck v. Church, 87 Tenn. 575; Graeven v. Dieves, 68 Wis. 317 (*semble*). See also Riopelle v. Hilman, 23 Mich. 33.

Doe v. Barnard, 13 Q. B. 945, lends no countenance to the cases just cited. In that case B. occupied without right for eighteen years, and died leaving a son; C. excluded the son and occupied for thirteen years, when he was ousted out by A., the original owner. C. brought ejectment against A., but failed; not, however, because of any right in A.; on the contrary, the latter, as plaintiff, in an ejectment against C., had been already defeated because the statute had extinguished his title. Doe v. Carter, 9 Q. B. 863. The court decided against C. in Doe v. Barnard, on the ground that he, being a disseisor of A.'s heir, who had the superior right, could not maintain ejectment

this opinion, with all deference, must be deemed erroneous. The laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same, and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors. If, indeed, the adverse possession is not continuous, if, for instance, B., after disseising A., abandons the land, leaving the possession vacant, and C. subsequently enters without right upon this vacant possession, he cannot, of course, tack his time to B.'s.¹ Upon B.'s abandonment of the land the disseisin comes to an end. In legal contemplation, A.'s possession revives.² Having the right to possess, and no one else having actual possession, he is in a position analogous to that of an heir, or conusee of a fine, before entry, and like them has a seisin in law. C.'s disseisin has, therefore, the same effect as if A. had never been disseised by B., and A.'s right of entry or action must continue until C. himself or

at all, even against a wrongful dispossessor. This view, although allowed in *Nagle v. Shea*, Ir. R. 8 C. L. 224, is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrongdoer by entry, by assize, or by ejectment. *Bract. f. 165 a*; 1 *Nich. Britt.* 296; *Bateman v. Allen*, Cro. El. 437, 438; *Jenk. Cent.* 42; *Allen v. Rivington*, 2 *Saund.* 111; *Smith v. Oxenden*, 1 *Ch. Ca.* 25; *Doe v. Dyball, M. & M.* 346; *Davison v. Gent*, 1 *H. & N.* 744, per *BRAMWELL, B.*; *Chisholm v. Marshalleck*, 1 *Jamaica L. R.* 13; *Ani Waata v. Grice*, 2 *N. Zeal. L. R.* 95, 117. This time-honored rule is universally prevalent in this country. The doctrine of *Doe v. Barnard* is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C., the unsuccessful plaintiff, has only to eject A. by force in order to turn the tables upon him. Once in possession, he could defeat a new ejectment brought by A., in the same way that he himself had been rebuffed; that is, by setting up the superior right of B.'s heir. Fortunately *Doe v. Barnard* has been overruled, in effect, by *Asher v. Whitlock*, L. R. 1 Q. B. 1. The suggestion of *MELLOR, J.*, in the latter case, although adopted by Mr. Pollock (*Poll. & Wr., Poss.* 97, 99), that the former case may be supported on the ground that the superior right of B.'s heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless. *Doe v. Barnard* may be regarded as thoroughly discredited by *Perry v. Clissold*, [1907] A. C. 73, 79-80.

¹ *Brandt v. Ogden*, 1 *Johns.* 156; *Malloy v. Bruden*, 86 *N. C.* 251; *Taylor v. Burnside*, 1 *Grat.* 165. See also *Brown v. Hanauer*, 48 *Ark.* 277.

² *Agency Co. v. Short*, 13 *App. Cas.* 793; *Solling v. Broughton*, [1893] A. C. 556, 561; *Louisville Co. v. Philyaw*, 88 *Ala.* 264, 268; *Downing v. Mayes*, 153 *Ill.* 330, 335; *Wishart v. McKnight*, 178 *Mass.* 356, 360; *Cunningham v. Patton*, 6 *Barr.* 355, 358, 359; *Jarrett v. Stevens*, 36 *W. Va.* 445, 450.

C. and his successors, have held adversely for twenty years. If the distinction here suggested between successive disseisins with continuous adverse possession, and successive disseisins without continuous adverse possession, had been kept in mind, a different result, it is believed, would have been reached in the American cases.¹

If the conclusions here advocated are true in regard to land, they would seem to be equally valid where there is a continuous adverse possession of chattels by successive holders, although there is no privity between them. But no decisions have been discovered upon this point.²

(5.) *By judgment.* One who has been wrongfully dispossessed of a chattel has the option of suing the wrongdoer in replevin, detinue, trover, or trespass. A judgment in replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in detinue establishes his right to recover the chattel *in specie*,³ or, that being impracticable, its value. A judgment in trespass or trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others.⁴ Accordingly, a judgment in trespass or trover against a sole wrongdoer who, at the time of judgment recovered, is still in possession of the chattel

¹ It is a significant fact that in most of these cases *Brandt v. Ogden*, 1 Johns. 156, a case where the adverse possession was not continuous, was cited as a decision in point.

² In *Norment v. Smith*, 1 Humph. 46; *Moffatt v. Buchanan*, 11 Humph. 369; *Wells v. Ragland*, 1 Swan. 501; *Hobbs v. Ballard*, 5 Sneed, 395, there was in fact a privity; but the court thought otherwise, and accordingly disallowed tacking, as the same court denies the right to tack in the case of land if there is no privity.

³ *Ex parte Drake*, 5 Ch. Div. 866; *Re Scarth*, 10 Ch. 234; *Eberle Co. v. Jones*, 18 Q. B. Div. 459; *Sharpe v. Gray*, 5 B. Mon. 4; *Norrill v. Corley*, 2 Rich. Eq. 288, n. (a).

⁴ *Lacon v. Barnard*, Cro. Car. 35; *Put v. Rawsterne*, T. Ray. 472, 2 Show. 211 (*semble*); *Hitchin v. Campbell*, 2 W. Bl. 827; *Lovejoy v. Wallace*, 3 Wall. 1, 16 (*semble*); *Barb v. Fish*, 8 Black. 481; *Rembert v. Hally*, 10 Humph. 513; *Serjeant Manning's note*, 6 M. & G. 160, n. a; *Daniel v. Holland*, 4 J. J. Marsh. 1826; *Wooley v. Carter*, 2 Halst. 85; *Outcalt v. Durling*, 1 Dutch. 443; *Dietz v. Field*, N. Y. App. Div. 1896; (but see *Union Co. v. Schiff*, 78 Fed. 216, 86 Fed. 1023). Similarly, if the converted chattel has been sold, the owner, by recovering a judgment in *assumpsit*, extinguishes all his other remedies against the converter. *Smith v. Baker*, L. R. 8 C. P. 350 (*semble*); *Bradley v. Brigham*, 149 Mass. 141, 144-145; *Boots v. Ferguson*, 46 Hun, 129; *Wright v. Ritterman*, 4 Rob. 704.

operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession, being thus set free from adverse claims, changes into ownership.¹

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in trespass or trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in trespass or trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C.,² or the proceeds of its sale in an action of assumpsit.³ It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.⁴

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have

¹ The chattel may therefore be taken on execution by a creditor of the converter. *Rogers v. Moore*, Rice, 60; *Norrill v. Corley*, 2 Rich. Eq. 288, n. (a); *Foreman v. Neilson*, 2 Rich. Eq. 287. See also *Morris v. Beckley*, 2 Mill, C. R. 227. But compare *Bush v. Bush*, 1 Strobb. Eq. 377. A purchaser from a converter after judgment should take a perfect title. *Goff v. Craven*, 34 Hun, 150, *contra*, would seem to be a hasty decision. If after a judgment against a converter, but before its satisfaction, the dispossessed owner retakes the chattel, the converter upon satisfying the judgment may maintain trover against the former owner. *Smith v. Smith*, 51 N. H. 571. This decision, as well as that in *Hepburn v. Sewell*, 5 H. & J. 211, was based upon the doctrine of relation, by which the converter's title, after satisfaction of the judgment, was made to relate back to the date of his conversion. The decision seems to be correct, but the doctrine of relation seems far fetched, and has been deservedly criticised by HOLMES, J., in *Miller v. Hyde*, 161 Mass. 472, 481.

² *Matthews v. Menedger*, 2 McL. 145; *Spivey v. Morris*, 18 Ala. 254; *Dow v. King* (Ark.), 12 S. W. Rep. 577; *Atwater v. Tupper*, 45 Conn. 144; *Sharp v. Gray*, 5 B. Mon. 4; *Osterhout v. Roberts*, 8 Cow. 43; *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928. But see *contra*, *March v. Pier*, 4 Rawle, 273, 286 (*semble*); *Fox v. Northern Liberties*, 3 W. & S. 103, 106 (*semble*); *Wilburn v. Bogan*, 1 Speer, 179.

Similarly, an unsatisfied judgment against C. is no bar to a subsequent action against B. *McGee v. Qverby*, 12 Ark. 164; *Hopkins v. Hersey*, 20 Me. 449; *Bradley v. Brigham*, 149 Mass. 141, 144-145. But see *contra*, *Murrell v. Johnson*, 1 Hen. & M. 449.

³ *Morris v. Robinson*, 3 B. & C. 196.

⁴ *Cooper v. Shepherd*, 3 C. B. 266.

jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in trespass or trover, all his rights against both are merged therein, and his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring replevin or detinue against the other to recover the chattel, or trespass or trover for its value; for the latter cannot invoke the maxim, *nemo bis vexari debet pro eadem causa*.¹ Not until the judgment against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.

(6.) *By fine*. If a disseisee levied a fine, nothing passed to the conusee, but the fine barred the conusor's right. The disseisor, therefore, gained an absolute title.²

¹ *Lovejoy v. Murray*, 3 Wall. 1; *Elliot v. Porter*, 5 Dana, 299; *Elliott v. Hayden*, 104 Mass. 180; *Floyd v. Brown*, 1 Rawle, 121 (*semble*); *Fox v. Northern Liberties*, 3 W. & S. 103 (*semble*); *Sanderson v. Caldwell*, 2 Ark. 195; *Sessions v. Johnson*, 95 U. S. 347, 349; *Birdsell v. Shaliol*, 112 U. S. 485, 489; *Knight v. Nelson*, 117 Mass. 458; *Miller v. Hyde*, 161 Mass. 472; *Tolman v. Waite*, 119 Mich. 341; *Hyde v. Noble*, 13 N. H. 494; *Osterhout v. Roberts*, 8 Cow. 43; *Russell v. McCall*, 141 N. Y. 437; *Turner v. Brock*, 6 Heisk. 50.

But see *contra*, *Brown v. Wootton*, Yelv. 67, Cro. Jac. 73; *Adams v. Broughton*, Andr. 18; *Buckland v. Johnson*, 15 C. B. 145; *Hunt v. Bates*, 7 R. I. 217; *Edevain v. Cohen*, 43 Ch. Div. 187 (*semble*); *Merrick's Est.*, 5 W. & S. 9, 17; *Hyde v. Kiehl*, 183 Pa. 414, 429; *Parmenter v. Barstow*, 21 R. I. 410 (*semble*); *Petticolas v. Richmond*, 95 Va. 456 (*semble*). In *Brinsmead v. Harrison*, L. R. 6 C. P. 584, L. R. 7 C. P. 547, one of the joint converters pleaded, to a count in detinue, a prior judgment against his companion. The plaintiff now assigned a detention subsequent to the joint taking. The court, with some reluctance, held the plea good, but also supported the replication, thus neutralizing one error by the commission of another, and so bringing about the same result as the American cases. The fallacy of the notion that the detention of a chattel by the wrongful taker is a fresh tort was exposed, curiously enough, by the same court in an earlier case in the same volume. *Wilkinson v. Verity*, L. R. 6 C. P. 206. Such a notion, as there pointed out, would virtually repeal the statute of limitations. See *Philpott v. Kelley*, 3 A. & E. 106.

² 2 Prest. Abs. 206.

LECTURE XVIII.

THE INALIENABILITY OF CHOSSES IN ACTION.¹

THE rule that a *choses* in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainderman his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res* or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.

A right of action for the recovery of land or chattels, or of a debt which, like land or chattels, was regarded as a specific *res*, did, indeed, descend to one's representative in the case of death. But this was hardly a departure from the rule, since the representative was looked upon as a continuation of the *persona* of the deceased.²

There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a *choses* in action. So, too, a reversion or a remainder was transferable by fine in the king's court,³ or by a customary devise, which, when

¹ Reprinted by permission from "Select Essays in Anglo-American Legal History," vol. iii, p. 580.

² The ancient appeals of battery, mayhem, imprisonment, robbery, and larceny were actions for vengeance, and from their strictly personal character naturally died with the party injured. Trespass for a personal injury, and *de bonis asportatis*, and *quare clausum fregit*, being for the recovery of damages only, also came within the maxim *actio personalis moritur cum persona*. By St. 4 Ed. III., c. 7, an executor was allowed to recover damages for goods taken from the testator by a trespass. And such has been the elasticity of this statute that under it actions for a conversion, for a false return, for infringement of a trademark, for slander of title, for deceit, — in short, actions for any tort whose immediate effect is an injury to or a diminution of another's property, have been held to survive. But not actions for torts which directly affect the person or reputation, and only indirectly cause a loss of property. In the United States the argument that a wrongdoer ought not to profit by the death of his victim, has led to legislation greatly increasing the actions that survive.

³ Attornment was necessary before the conusee could distrain or bring an action against the tenant for services or rent. But the tenant could be compelled to attorn by the writs *Quid juris clamat*, and *Per quæ servitia*. 2 Nich. Britt. 46-48.

recorded in the local court, operated like a fine.¹ Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced by a transferee. If, for instance, one granted an annuity to A. and his assigns, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A. and his assigns, the assignee was allowed to bring an action in his own name against the grantor,² covenantor,³ and warrantor,⁴ respectively.

The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that this rule had its origin in the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits"⁵ shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence.⁶ The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.

A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say, a *chose* in action always presupposes a personal re-

¹ Y. B. 19 Hen. VI. 24, 47; Co. Lit. 322 a.

² 1 Nich. Britt. 269-270; Maund's Case, 7 Rep. 28 b; Co. Lit. 144, Butler's note [236]; Scott v. Lunt, 7 Pet. 596.

³ (1233) 2 Bract. Note Book, pl. 804; Y. B. 21 Ed. I. 137; Old Nat. Br., Rast. L. Tr. 67; Fitz. Nat. Br. 145.

⁴ (1233) 2 Bract. Note Book, pl. 804; Bract. f. 37 b, 381 b, 390, 391; 1 Nich. Britt. 255-256; (1285) Fitz. Ab. Garr. 93. These citations from Bracton are hardly reconcilable with the interpretation which Mr. Justice HOLMES has given in "The Common Law" (pp. 373-374) of an obscure and possibly corrupt passage in Bracton, f. 17 b. In view of Professor Brunner's investigations (*Zeitschrift f. d. gesammte Handelsrecht*, Vol. 22, p. 59, and Vol. 23, p. 225), the distinguished judge would doubtless be among the first to correct his remark on p. 374: "By mentioning assigns the first grantor did not offer a covenant to any person who would thereafter purchase the land."

⁵ Lampet's Case, 10 Rep. 48 a.

⁶ "But in regard to *choses* in action, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another." 2 Spence, Eq. Jur. 850. See also Pollock, Contracts, 5th ed., 206; Holmes, Common Law, 340-341; Maitland, 2 L. Q. Rev. 495.

lation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferor and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may, of course, be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or, without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action,¹ and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment.

When the substitution of duties is by consent, the consent may be given either after the duty arises or contemporaneously with its creation. In the former case the substitution is known as a novation, unless the duty relates to land in the possession of a tenant, in which case it is called an attornment. A consent contemporaneous with the creation of the duty is given whenever an obligation is by its terms made to run in favor of the obligee and his assigns, as in the case of annuities, covenants, and warranties before mentioned, or to order or bearer, as in the case of bills and notes and other negotiable securities. Here, too, on the occasion of each successive transfer, there is a novation by virtue of the obligor's consent given in advance; the duty to the transferor is extinguished and a new duty is created in favor of the transferee.

The practice of attornment prevailed from time immemorial, but was confined to the transfer of reversions and remainders. Novation, although now a familiar doctrine, was, if we except the case of obligations running to the obligee and his assigns, alto-

¹ In general, whatever would survive to an executor passes to the assignee of a bankrupt.

gether unknown before the days of *assumpsit* upon mutual promises.¹ The field for the substitution of duties by consent was therefore extremely limited, and in the great majority of cases a creditor would have found it impossible to give another the benefit of his claim had not the ingenuity of our ancestors devised another expedient, namely, the letter of attorney. By such a letter, the owner of a claim appointed the intended transferee as his attorney, with power to enforce the claim in the appointor's name, but to retain whatever he might recover for his own benefit. In this way the practical advantage of a transfer was secured without any sacrifice of the principle of the inalienability of *choses* in action.²

Indeed, so effectual was the power of attorney as a transfer, that, during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferrer. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the fifteenth century, if not earlier, till near the close of the seventeenth century.³

¹ The *rationale* of this doctrine is as follows: The so-called assignee of a claim is in reality an attorney with a power to sue for his own use. Being thus *dominus* of the *choses* in action, he enters into a bilateral contract with the obligor, promising the latter never to enforce his claim in return for the obligor's promise to pay him what is due thereon. This promise of perpetual forbearance operates as an equitable release of the old claim, and also as a consideration for the obligor's new promise.

² In 1 Lilly's Abr. 125, it is said: "A statute merchant or staple, or bond, etc., can not be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R." See also *Deering v. Carrington*, 1 Lilly, Abr. 124; *Shep. Touchst.*, 6th ed., 240; 2 Blackst. Com. 442; *Leake, Cont.*, 2d ed., 1183; *Gerard v. Laws*, L. R. 2 C. P. 308, 309, per WILLES, J. These letters of attorney for the attorney's own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiquity. (1309) *Riley, Memorials of London*, 68. "Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person." See also *West, Symbol.*, § 521.

³ Y. B. 9 Hen. VI. 64, 17; Y. B. 34 Hen. VI. 30, 15; Y. B. 37 Hen. VI. 13, 3; Y. B. 15 Hen. VII. 2, 3; *Penson v. Hickbed* (1588), 4 Leon. 99, Cro. El. 170; *South v. March* (1590), 3 Leon. 234; *Harvey v. Bateman* (1600), Noy, 52; *Barrow v. Gray* (1600), Cro. El. 551; *Loder v. Chesleyn* (1665), 1 Sid. 212; *Note* (1667-1772), *Freem. C. C.* 145. See also *Pollock, Cont.*, 5th ed., 701; 1 *Harv. L. Rev.* 6, n. 2.

The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of *choses* in action, and the notion became current that

The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property.¹

By statute, in many jurisdictions, the assignee may even sue in his own name. But it is important to bear in mind that the assignee under the statute still proceeds in a certain sense as the representative of the assignor. The statute of itself works no novation. It introduces only a change of procedure.² A release by the assignor to the debtor, ignorant of the assignment, extinguishes all liability of the debtor to any one.

So, if the assignor should wrongfully make a second assignment, and the second assignee should collect the debt, he would keep the money, and the first assignee would get nothing.³

no contracts were assignable, not even covenants or policies of insurance and the like, although expressly payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants. Warranties being obviously not open to the objection of maintenance continued assignable, and so did annuities, although not without question. Perkins, Convey., § 101.

¹ Formerly an express power of attorney was indispensable (Mallory v. Lane, Cro. Jac. 342; see also Allen's Case, Ow. 113), the notion of an implied power being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise. ² Harv. L. Rev. 52, 58. See Moyle, Justinian, 466. To-day, of course, the power will be implied from circumstantial evidence. Formerly a deed could not be delivered in escrow without express words to that effect. Bowker v. Burdekin, 11 M. & W. 128, 147.

² Accordingly an assignment in New York, where, by statute, actions must be brought by the real party in interest, did not enable the assignee to sue in Massachusetts, where the old rule that an assignee must sue in the assignor's name still prevails. Leach v. Greene, 116 Mass. 534; Glenn v. Busey, 5 Mack. 733. If the statute truly effected a change of title, the assignee, like the indorsee of a bill, would sue in his own name anywhere.

³ The assignee of an equitable *chose* in action, e. g., a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable incumbrance. Newman v. Newman, 28 Ch. D. 674. So, if a *cestui que trust* should assign his trust first to A. and then to B., and B. should, in good faith, obtain a conveyance of the legal title from the trustee, he could hold it against A. What is true of the equitable trust is equally true of the analogous legal bailment. By judicial legislation the purchaser from a bailor is allowed to proceed in his own name against the bailee. But a bailee who, for value and in ignorance of the bailor's sale of his interest, receives a release from the latter, may keep the chattel. If a bailee, in ignorance of a sale by the bailor, should deliver the goods to the bailor or to some person designated by the bailor, he could not be charged by the bailor's vendee. He would simply have performed his contract according to

We are now in a position to consider upon principle to what extent and in what mode a disseisee's interest in land or chattels may be transferred. The disseisee, by reason of the disseisor's tort, has a right to recover the *res* from the latter by self-redress or by action. This relation between the two, as we have seen, cannot be specifically transferred to another. There is, of course, no question of novation in such a case. But the mode of transfer which proved so effectual in the case of rights *ex contractu*, is equally applicable to claims arising *ex delicto*. The disseisee has only to constitute the intended grantee his attorney with power to recover the land or chattel, and to keep for his own benefit the *res* when recovered. There is an instance of such a grant as old as the time of Richard I.: "*G, filius G. ponit loco suo J. versus Gil. . . de placito XL. acrarum terræ in H. ad lucrandum vel perdendum et CONCEDIT EI TOTUM JUS SUUM quod habet in predicta terra.*"¹

The doctrine of maintenance which so long hampered the assignment of contractual rights proved an even more persistent obstacle to the transfer of rights to recover land or chattels. Indeed, in the case of land it was an insuperable obstacle in England until 1845; for up to that time the Statute 32 Henry VIII. c. 16, expressly nullified all grants by one disseised. In this country,

its tenor. *Saxeby v. Wynne*, 3 Stark. Ev., 3d ed., 1159; *Glynn v. E. I. Co.*, 7 App. Cas. 591; *Jones v. Hodgkins*, 61 Me. 480; *Woods v. McGee*, 7 Oh. 127 (as explained in *Newhall v. Langdon*, 39 Oh. St. 87, 92); *McGee v. French*, 49 S. C. 454 (*semble*); and if a bailor should sell his interest successively to A. and B., and B. should obtain possession from the bailee, A. could not recover the chattel from B. Upon principle and by the old precedents the bailor's interest is no more transferable than that of a creditor. *Y. B. 22 Ed. IV. 10-29*; *Wood v. Foster*, 1 Leon. 42, 43, pl. 54; *Marvyn v. Lyds, Dy. 90 b*, pl. 6; *Rich v. Aldred*, 6 Mod. 216; 2 Blackst. Com. 452. A late as 1844, that great master of the common law, Mr. BARON PARKE, ruled that a purchaser from a pledgor could not maintain in action on his own name against the pledgee. The court *in banc* reversed this ruling. *Franklin v. Neate*, 13 M. & W. 481. See also *Goodman v. Boycott*, 2 B. & S. 1; *Bristol Bank v. Midland Co.*, [1891] 2 Q. B. 653. The innovation has been followed in this country. *Carpenter v. Hale*, 8 Gray, 157; *Hubbard v. Bliss*, 12 All. 590; *Meyers v. Briggs*, 11 R. I. 180; *Jack v. Eagles*, 2 All. (N. B.) 95.

¹ (1134) 1 Rot. Cur. Reg. 42, cited by Brunner, 1 Zeitschrift für Vergleichende Rechtswissenschaft, 367. See also "A Boke of Presidents," fol. 86 b: "Noveritis me P. loco meo posuisse T. meum verum et legitimum atturnatum ad prosequendum . . . vice et nomine meo pro omnibus illis terris . . . vocatis W. . . . quæ mihi . . . descendebant et quæ in presenti a me injuste detinentur. Necnon in dictas terras . . . vice et nomine meo ad intrandum ac plenam . . . possessionem et seisinam . . . capiendum . . . et super hujusmodi possessione sic capta et habita dictas terras . . . AD USUM DICTI T. custodiendum gubernandum occupandum et ministrandum."

however, the right of the grantee of a disseisee to bring a real action in the name of his grantor has, during the present century, been generally recognized.¹

It is believed that in England, at the present day, one who is dispossessed of his chattels may so far transfer his interest as to enable the assignee to bring an action to recover the chattel or its value in the name of the assignor.² But no decision has been found upon the point. In the United States the right of the transferee to sue in the transferor's name,³ or, in jurisdictions where the real party in interest must be plaintiff, in his own name,⁴ would be universally conceded.

We have thus far assumed that the dispossessed owner has nothing to transfer but a right of action or recaption; that when he is called owner, nothing more is meant than that he has the chief one of the two elements of perfect ownership, namely, the right of possession, and is, therefore, potentially owner. This assumption is conceived to be well founded, and is supported by abundant authority.⁵ There are, however, a few decisions and *dicta* to the

¹ *Steeple v. Downing*, 60 Ind. 478; *Vail v. Lindsay*, 67 Ind. 528; *Wade v. Lindsey*, 6 Met. 407; *Cleveland v. Flagg*, 4 Cush. 76; *Farnum v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140; *Rawson v. Putnam*, 128 Mass. 552, 553; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Betsey v. Torrance*, 34 Miss. 132; *Hamilton v. Wright*, 37 N. Y. 502; *Wilson v. Nance*, 11 Humph. 189, 191; *Edwards v. Roys*, 18 Vt. 473; *University v. Joslyn*, 21 Vt. 61; *Edwards v. Parkhurst*, 21 Vt. 472; *Park v. Pratt*, 38 Vt. 545; *Paton v. Robinson*, 81 Conn. 547, 71 Atl. 730; *Brinley v. Whiting*, 5 Pick. 348; *Livingston v. Proseus*, 2 Hill, 526; *Dever v. Hagerty*, 169 N. Y. 481; *Galbraith v. Payne*, 12 N. Dak. 164; *Ten Eyck v. Witbeck*, 55 N. Y. App. Div. 165, *aff'd* 170 N. Y. 564; *Saranac Co. v. Roberts*, 125 N. Y. App. Div. 333, 341; *Hasbrouck v. Bunce*, 62 N. Y. 475.

² See *Cohen v. Mitchell*, 25 Q. B. D. 262.

³ *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Holly v. Huggefords*, 8 Pick. 73; *Boynton v. Willard*, 10 Pick. 166; *Clark v. Wilson*, 103 Mass. 219, 222; *Jordan v. Gillen*, 44 N. H. 424; *North v. Turner*, 9 S. & R. 244.

⁴ *Lazard v. Wheeler*, 22 Cal. 139; *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Smith v. Kennett*, 18 Mo. 154; *Doering v. Kenamore*, 86 Mo. 588; *McKee v. Judd*, 12 N. Y. 622; *Robinson v. Weeks*, 6 How. Pr. 161; *Butler v. N. Y. Co.*, 22 Barb. 110; *McKeage v. Hanover Co.*, 81 N. Y. 38; *Birdsall v. Davenport*, 43 Hun, 552; *Lincoln Co. v. Allen*, 82 Fed. 148; *Howe v. Johnson*, 117 Cal. 37; *Lawrence v. Wilson*, 64 N. Y. App. Div. 562.

⁵ In addition to the early English authorities cited *supra*, pp. 180, 181, see *Scott v. McAlpine*, 6 Up. Can. C. P. 302; *Murphy v. Dunham*, 38 Fed. Rep. 503, 506; *Goodwyn v. Lloyd*, 8 Port. 237; *Brown v. Lipscomb*, 9 Port. 472; *Duncklin v. Williams*, 5 Ala. 199; *Huddleston v. Huey*, 73 Ala. 215; *Foy v. Cochran* 88 Ala. 353, 6 So. Rep. 685; *McGoon v. Ankeny*, 11 Ill. 558; *O'Keefe v. Kellogg*, 15 Ill. 347; *Taylor v. Turner*, 87

contrary.¹ These adverse opinions all go back to a *dictum* of Mr. Justice STORY: "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title to every person, not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against the wrongdoer."² Had this unfortunate *dictum* proceeded from a less distinguished source, it probably would not have had its present following. It may be said of it that it involves a *petitio principii*, assuming without proof, and in contradiction of all precedent, that the dispossessed owner really has something more than a right of action. What this something is has never been defined, and, it is submitted, for the reason that non-existent things are incapable of definition.

Let us test this *dictum*, however, by some of its practical consequences. We will suppose that after the sale the converter, in ignorance thereof, makes full compensation to the vendor for the conversion, and receives from him a release. Will it be maintained that the converter cannot hold the chattel against the vendee? And yet if the title passed to the vendee by the sale, that title cannot be affected by a subsequent release by one who has no title. Again, we may assume that the vendor wrongfully makes a second sale, and that the second vendee, being still in ignorance of the first sale, recovers the chattel or its value from the converter. Must the second vendee surrender what he recovers to the first vendee? Surely not. But he must if the *dictum* under discussion is sound. Thirdly, if the title passed to the vendee, what becomes of the vendor's right of action? Surely he cannot recover the value of the chattel from the converter after he has sold it to another.

Ill. 296 (*semble*); *Ericson v. Lyon*, 26 Ill. Ap. 17; *Stogdel v. Fugate*, 2 A. K. Marsh. 136; *Young v. Ferguson*, 1 Litt. 298; *Davis v. Herndon*, 39 Miss. 484; *Warren v. St. Louis Co.*, 74 Mo. 521; *Doering v. Kenamore*, 86 Mo. 588; *Gardner v. Adams*, 12 Wend. 297; *Blount v. Mitchell*, 1 Tayl. (N. C.) 130; *Morgan v. Bradley*, 3 Hawks, 159; *Stedman v. Riddick*, 4 Hawks, 29; *Overton v. Williston*, 31 Pa. 155.

¹ *Brig Sarah Ann*, 2 Sumn. 206, 211; *Tome v. Dubois*, 6 Wall. 548; *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; *Clark v. Wilson*, 103 Mass. 219, 222-3 (*semble*); *Dahill v. Booker*, 140 Mass. 308, 311 (*semble*); *Serat v. Utica Co.*, 102 N. Y. 681 (*semble*); *Kimbro v. Hamilton*, 2 Swan, 190.

² *Brig Sarah Ann*, 2 Sumn. 206, 211.

But it may be urged he will be entitled to nominal damages only. Be it so. Suppose, then, that immediately after the sale the chattel is accidentally destroyed. The vendor will recover his nominal damages, the vendee will get nothing, and the converter will go practically scot free. It is possible to say, however, that the sale passes not only the title, but also the right to sue in the vendor's name for the conversion. But this hypothesis may work an injustice to the converter. If not sued for six years his title will be perfect. Suppose the sale to occur near the end of the period of limitation, and that the vendee can prove a conversion subsequent to the sale, as by a demand and refusal, the statute would run for another six years, which could not have happened in favor of the vendor if there had been no sale. In other words, the rule, *Nemo dare potest quod non habet*, would be violated.¹

All these unsatisfactory results are avoided by the adoption of the opposite view, supported alike by precedent and general reasoning, that a right of action is the sum and substance of the interest of a dispossessed owner of a chattel. On this theory the sale of the disseisee's right of action has the same operation as the assignment of a debt. The vendee stands in the place of the grantor, but does not displace him. He cannot accordingly extend the statute of limitations to the detriment of the converter. A release by the vendor for value to the converter who is ignorant of the sale, although wrongful, extinguishes all right to recover possession from the latter, and so makes him complete owner of the chattel. And, finally, a second purchaser from the dispossessed owner, who in good faith gets the chattel from the converter, may keep it. If, furthermore, statutes existed in all jurisdictions, enabling the purchaser from a dispossessed owner of a chattel to sue for its recovery in his own name, there would be a complete harmony between the requirements of legal principle and commercial convenience.

In conclusion, then, the ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

¹ See *Overton v. Williston*, 31 Pa. 155, 160.

LECTURE XIX.

INJURIES TO REALTY.

A. ASSIZE OF NOVEL DISSEISIN.

A TYPICAL case of tort to realty was disseisin of a freeholder. In case of disseisin the disseisee might resort to self-redress or to an action. If he wished to re-enter without an action he must act diligently; the time was not definitely defined in Bracton, but must be less than fifteen days,¹ if the disseisee was present at the time of the disseisin. A longer time was allowed if he was away from home. The time for self-redress was shortened when Britton wrote.² The disseisee must re-enter in five days. He was entitled to a day to go to each of the points of the compass to collect his friends to assist him in forcibly expelling the disseisor on the fifth day.³ Observe the analogy between this collection of friends and the hue and cry in appeal of robbery. Afterwards a right of entry existed until a feoffment by disseisor after a year and a day.⁴ Later a right of entry was tolled only by a descent cast.⁵ Still later⁶ the right of entry was not tolled by descent cast unless the disseisor was in possession five years.⁷ But in Massachusetts the law was as in England⁸ until 1836.⁹ If a disseisee was not powerful enough to oust his disseisor, or if he delayed too long, he must seek the aid of the court. His action was known as assize of novel disseisin, an action invented "after many vigils,"¹⁰ and of Norman origin, in the time of Henry II. This action is commonly treated as a real action; but it was as much a personal action as the appeal of robbery for the recovery of goods. Both were mixed actions.

¹ 3 Twiss, Bract. 27.

² See 4 L. Q. Rev. 30.

³ Co. Lit. 238 a.

⁷ See analogy to case of abatement of nuisances and fresh suit in appeals and recovery of a serf. Bract. 6 b.

⁸ Emerson v. Thompson, 2 Pick. 473; Putney v. Dresser, 2 Met. 583.

⁹ Rev. St. c. 101, § 5.

² 1 Nich. Br. 293-294.

⁴ Co. Lit. 238 a.

⁶ By St. 32 Hen. VIII. c. 33.

¹⁰ 3 Tw. Bract. 39.

It was always founded upon a tort, *i. e.*, a disseisin. The disseisor was a necessary party defendant even though no longer in possession at the time of assize brought,¹ consequently there was no remedy where the tenant was grantee of a disseising king.² If a disseisor was still in possession and disseisin proved, the plaintiff recovered the land, with damages, including mesne profits and the value of chattels carried off;³ or the plaintiff might if he preferred bring an appeal of robbery or trespass *d. b. a.* for the goods.⁴ Of course the defendant was fined. If the tenant and the original disseisor were distinct persons, the disseisor was still liable to the plaintiff for damages. Intermediate holders between the disseisor and the tenant were not liable at all, not being disseisors; and for the same reason the tenant⁵ was compelled only to restore the land.⁶ He was not originally liable to pay damages to the plaintiff,⁷ even though he might have acquired possession by disseising the first disseisor.⁸

By Statute of Gloucester,⁹ "If disseisors do alien the lands, and have not whereof there may be damages levied,¹⁰ that they to whose hands such tenements shall come, shall be charged with the damages, so that every one shall answer for his own time;" *i. e.*, if necessary, a feoffee of the disseisor is liable for the fruits of the land rather on the theory of unjust enrichment than of tort.

If a tenant was in by feoffment of a disseisor, he might, like the appellee in the appeal of robbery, vouch his feoffor to warranty; and, as in the appeal, though he was obliged to surrender the property, he was entitled to compensation from his feoffor.¹¹

There was a difference between assize of novel disseisin and appeal

¹ 1 Nich. Br. 277; 3 Tw. Bract. 33, 41, 109, 111, 339, 341.

² 2 Bract. Note Book, No. 76, 401. See Bracton, 168 *b*, 204 *b*, cited by Maitland in note to No. 76.

³ Judgment in assize a bar to trespass *d. b. a.*; Y. B. 30 Ed. I. 35; Y. B. 30 Ed. I. 172; 30 Ed. I. 376 (replevin).

⁴ 1 Nich. Br. 358; 3 Tw. Br. 197-205.

⁵ 3 Tw. Br. 341.

⁶ On the contrary, Demandant *in misericordia* if he charged grantee with disseisin. 2 Br. N. B. 617; 2 Br. N. B. 1191.

⁷ 3 Tw. Br. 35, 99, 109.

⁸ 3 Tw. Br. 97; Y. B. 37 Hen. VI. 35, 22; Y. B. 13 Hen. VII, 15, 11, grantee of disseisor; Symons v. Symons, Hetley, 66, grantee of disseisor; 2 Br. N. B., No. 617 (1231), grantee of disseisor.

⁹ 6 Ed. I.

¹⁰ See Y. B. 14 Ed. III. 150.

¹¹ 1 Nich. Br. 356; Bract. 178 *b*; Fleta, 219, §§ 22, 23.

of robbery (or trespass d. b. a.) in regard to the plaintiff's "right" in the two actions. Actual possession was not essential to the maintenance of an assize. If plaintiff was a freeholder, he might recover, though the land was actually occupied by his termor; whereas an owner of goods could not bring appeal or trespass for carrying off goods from the possession of his bailee for a term.¹

Again the assize differed from appeal and trespass in that the actual occupant of land, i. e., a termor, if not the freeholder,² could not have an assize.³ This difference was doubtless due to the criminal nature of the appeal, and to the necessity of summary pursuit of the thief; also to the fact that an actual possessor of personal property being accountable therefor to the true owner needs a remedy to protect himself: whereas the land could not be carried off. In most cases when a termor was ousted by a stranger, it is probable that the lord proceeded against the wrongdoer by assize, and upon his recovery of the freehold the termor would get the possession again.

Originally the termor, though he had been dispossessed, was without legal remedy unless ousted by his lord, the lessor.⁴ Against the latter he might bring a writ of covenant and recover his term and damages.⁵ If the lessor ousted the termor and enfeoffed another, the lessee could not of course recover the term in his action against the lessor; and the claim of damages might be fruitless from the lessor's want of property.

Nor could a lessee obtain any relief against the feoffee. The latter was not liable in covenant, for he was not a party to it; nor in tort, for he had committed no tort.⁶ He had simply taken a conveyance from one who had the title. To prevent this injustice to the lessee a writ was devised by Walter de Raleigh, in the twentieth year of Henry III., called *Quare ejecit infra terminum*, whereby lessee was

¹ 1 Nich. Br. 275; Y. B. 3 Hen. VI. 32, 33, 24; Y. B. 5 Ed. III. 13, 2.

² First disseisor is of course freeholder and may therefore have assize, even against disseisee and true owner who returns after too long a delay. 1 Nich. Br. 274; 3 Tw. Br. 271 (195 b), 349 (205 a), (162 b-164 b), 382 (209 b), 390 (210 a), 274 (196 a), 408 (212 b), 44 (165 b), 64 (168 a), 172-182 (183 b-184 b), and see now Maitland's article, 4 L. Q. Rev. 24.

³ Br. 162 a (3 Tw. Br. 18); Br. 165 a (3 Tw. Br. 40, 42); Br. 167 b (3 Tw. Br. 62); 1 Nich. Br. 276, 287; Y. B. 3 Hen. VI. 32, 33, 24.

⁴ See Y. B. 3 Ed. II. 49, and cases cited 1 L. Q. Rev. 332.

⁵ 3 Tw. Br. 469; Y. B. 30 Ed. I. 283 (*semble*); 1 Nich. Br. 417; Y. B. 46 Ed. III. 4, 12.

⁶ Y. B. 38 Ed. III. 33 b, per THORP, C. J.

enabled to recover the term from the feoffee of his lessor, and damages for loss of ~~meane~~ profits.¹ It is remarkable that Britton makes no mention of this writ *Quare ejecit infra terminum*. Indeed he says that if a lessor without attachable property ousts his lessee and enfeoffs another "en tel cas ne ad uncore ordeyn ne nul certain remedie vers le lessour; et pur ceo le meillour conseil en tal cas est, qe les fermers se tiennent en seisine taunt cum il porrout; et si il soint engettez, jalemyns ne mettent peyne de user lour seisine et destourber le purchaceour de user taunt cum il purrout, si la qe lour gré soit fet en acune manere." Besides the authority of Bracton and Fleta, *supra*, there is a reported case in the reign of Henry III.²

Bracton says³ that *quare ejecit infra terminum* lay against a lessor; but this seems to be a mistake. All the reported cases of this writ were cases where defendant was in by title under the lessor.⁴

Neither covenant nor *Quare ejecit infra terminum* helped the lessee against an ouster by a stranger.⁵ Such an ouster was obviously a pure tort not differing in its nature or effect from a dispossession of the plaintiff of his chattels for which trespass *de bonis asportatis* was an established remedy. It was natural, therefore, to give the dispossessed termor an action of trespass against the stranger. The first case that I have found⁶ was in the thirty-eighth year of Edward III.⁷ In this case the action, it is true, was brought against the

¹ See 3 Harv. L. Rev. 173, 175, for this writ. See also 3 Tw. Br. 496, 473; Fleta, 275, 276.

² 20 Hen. III. 3 Br. Note Book, 158; see also Stath. Abr. Quare Ejecit, etc. (3 Ed. I.) Fitz. Abr. Quare Ejecit, etc. "In *quare ejecit infra terminum* plaintiff recovers his term and damages, etc., where by reason of sale . . ."

³ 3 Tw. Br. 469-473.

⁴ 20 Hen. III. 3 Br. N. B. pl. 158; Y. B. 30 Ed. I. 282; Y. B. 6 Ed. II. 177 (Cosynage); Y. B. 18 Ed. II. 599; 20 Ed. III. Stath. Abr. Quare Ejecit; Fitz. Abr. Quare Ejecit; Y. B. 46 Ed. III. 4, 12; Y. B. 19 Hen. VI. 56, 19; see also Rast. L. Tr. 81 d, e; Old Nat. Br. (Ed. 1525), 134 a, and text-writers generally. Furthermore, in Y. B. 21 Ed. IV. 10, 1, 30, 25, "And at this time it was agreed by all the court that against lessor lies *ejectio firme* and not *quare ejecit infra terminum*."

⁵ Bracton extends the *Quare ejecit infra terminum* to ouster by stranger. See, however, Adams, Ejectment, 4, 5, where the author seeks unsuccessfully, *semble*, to bring Bracton's language into harmony with the common opinion that *Quare ejecit infra terminum* would not lie against a stranger.

⁶ Adams, Ejectment, speaks of ejectment as introduced in the time of Edward II. or early in the reign of Edward III., but cites 44 Ed. III. as the first recorded case.

⁷ Y. B. 38 Ed. III. 33 b. In Y. B. 9 Ed. III. 7, 16, there was no allusion to *ejectio firme*, which would have been natural if it existed.

lessor. But if it would lie against him who was already liable in covenant *a fortiori* it would be good against a stranger against whom it was the only remedy.¹ A case against a stranger is found in the forty-fourth year of the same reign,² where the action is dealt with as a familiar action.³ That this action was regarded only as a mere variation of trespass d. b. a. is shown in several ways.

(1) In 1382⁴ it is said: "*Nota per BELKNAP, C. J., that an *ejecit firmæ* is only an action of trespass in its nature, and in *ejecit firmæ* plaintiff never recovers his term which is to come, no more than in trespass one shall recover damages for a trespass not done, but to be done; but he ought to sue by action of covenant at common law and recover his term, *quod tota Curia concessit*."*

(2) The writ was always *vi et armis*.⁵

(3) An executor was allowed to sue for ouster of the testator, by an equitable construction of Statute 4 Ed. III. c. 6, which gave executors trespass for goods taken from testator.⁶

The purely personal nature of the *ejectio firmæ* as an action of trespass for damages was maintained as late as 1455,⁷ when CHOKE distinguishes between *quare ejecit infra terminum* as a means of recovering the term and *ejecit firmæ* as trespass for damages only. But in 1468⁸ CATESBY and FAIRFAX say that the term is recoverable in *ejectio firmæ*.⁹ The conversion of *ejectio firmæ* from a personal to a mixed action was effected by the common law to prevent the competition of the jurisdiction of equity. For lessees had begun to resort to equity for specific performance by the lessor and for injunction against strangers. The action of *ejectio firmæ* also superseded in time the *quare ejecit infra terminum* as a remedy against the feoffee of the lessor.¹⁰

¹ See also similar cases: Y. B. 48 Ed. III. 6 & 7, 12; Y. B. 9 Hen. VI. 43, 21.

² Y. B. 44 Ed. III. 22, 26.

³ See also Y. B. 12 Hen. IV. 10, 20, per HANKFORD, J.; Y. B. 1 Hen. V. 3, 3.

⁴ 6 Rich. II. Fitz. Abr. Ejectio Firmæ, 2.

⁵ Rast. L. Tr. 81 i (Old Nat. Br., ed. 1528), 134 b.

⁶ Y. B. 7 Hen. IV. 6, 1.

⁷ Y. B. 33 Hen. VI. 42, 19.

⁸ Y. B. 7 Ed. IV. 6, 16.

⁹ To same effect, 1482, Y. B. 21 Ed. IV. 11, 2, per HUSSEY; and in Rast. Entries, is a judgment for plaintiff that he recover his term.

¹⁰ Y. B. 33 Hen. VI. 42, 19. Note by CHOKE: "If tenant is ousted by alienec, he may have general writ of trespass *vi et armis* against him, as has been adjudged, as well as *quare ejecit infra terminum*." Y. B. 21 Ed. IV. 10, 1; 30, 25, per LITTLETON, J. But see BRIAN, C. J., and CHOKE, J., *contra*.

Actual possession was essential to *ejectio firmæ*.¹ The later development of ejectment as a mode of recovery of possession for freeholders as well as termors belongs to the law of property.

B. TRESPASS QUARE CLAUSUM FREGIT.

Assise and *ejectio firmæ* (*i. e.*, trespass) were then the remedies for dispossessed freeholders and termors respectively.

But of course there were many physical injuries to realty not amounting to an ouster. The remedy for these injuries was by writ of trespass *quare clausum fregit*. "It should seem that this writ of trespass was a late invention not wholly approved by Bracton; for it is said in another part of this author's work,² that the writ *quare vi et armis* a person entered land would be bad, because it would be making a question of the *mode* of the trespass when it should be for the trespass simply."³ This writ seems to have come into use in the King's courts at the same time with trespass for injuries to person and trespass *d. b. a.*⁴

There are, it is true, certain earlier writs of trespass to be found in Bigelow;⁵ but these cases were to be disposed of in the old Common Law courts, Court Baron, or County Court, not in the Norman King's Court. In no one of the writs above referred to is any mention made of *vi et armis*, which were invariably inserted in writs of trespass *quare clausum fregit* brought in the King's court.

Although trespass *quare clausum fregit* established itself before Bracton's time notwithstanding his alleged criticism of it, it is nevertheless true that it was not a common writ in the first half of the thirteenth century.⁶

¹ Was this always the case? Keil. 130, pl. 99.

² Where? Bigelow says he has not been able to find this remark of Bracton. Big., L. C. Torts. *Scoble*, Bract. 413.

³ 1 Reeves, 338, 9.

⁴ (1228) 2 Bract. Note Book, No. 287; (1230) 2 Bract. Note Book, No. 378; (1221) 3 Bract. Note Book, No. 1520. See cases of trespass *vi et armis, d. b. asportatis*, in 1194; 2 Rot. Cur. Reg. 34; 2 Rot. Cur. Reg. 51; 38 Hen. III. Abr. Pl. 134, *Leyc.* 17, 138 *Leyc.* 17, s. c.; 134, *Sumn.* 19 & 19.

⁵ Pl. Ang. Nor. 2, 9; 1105-1107 (?), *Faritius v. Men of Stanton*, Big. Pl. Ang. Nor. 89; 1105-1107 (?), *Faritius v. Men of Stanton*, Big. Pl. Ang. Nor. 89; 1108, *Faritius v. de Sackville*, Big. Pl. Ang. Nor. 98; 1109-1110, *Faritius v. Gamel* (hundred), Big. Pl. Ang. Nor. 102; Temp. Hen. I. Abbot of Westminster *v. Certain Men*, Big. Pl. Ang. Nor. 127; Temp. Stephen, Big. Pl. Ang. Nor. 166.

⁶ An attempt to bring an appeal *de pratis pastis* was unsuccessful. 1202, 1 Seld.

The assize of novel disseisin was in many cases a safer writ for the plaintiff than trespass *quare clausum fregit*, for if the injury turned out to be a disseisin, the plaintiff who sued in trespass failed, and as any entry under a claim of freehold was a disseisin, a defendant by pleading *liberum tenementum* could defeat the plaintiff without more. There was such a plea in 1230;¹ a similar plea was interposed in the thirty-eighth year of Henry III,² and other cases with similar judgments occurred in the next reign.³ In 1338 it would seem to have been still law that trespass *quare clausum fregit* would not lie where an assise might have been brought;⁴ but the old doctrine was evidently being questioned, and later in that reign trespass *quare clausum fregit* became a concurrent remedy with assise.⁵

On the other hand, the plaintiff in assise was not turned out of court if he failed to show a disseisin. He could recover in the assise

Soc'y, pl. 35. Trespass *quare clausum fregit* therefore came directly from the popular courts, without passing through the intermediate stage of appeal, like trespass d. b. a.

¹ 2 Br. Note Book, 373, and plaintiff failed. See also 37 & 38 Hen. III, Abr. Pl. 132, col. 2, rot. 13, Essex. "Et Abbas venit et dicit quod non debet ei respondere quia abbas est de illo tenemento in seisinia ut de lib. ten. suo, nec videtur ei quod sine assisa vel brevi de nova disseisina debeat ei de illo ten. respondere."

² Abr. Pl. 142, col. 1, rot. 9, Lanc. Trespass for entry on turbary. Plea "quod non videtur eis quod debeant ad hoc breve respondere quia turbaria illa est solum suum et non ipsius R. (plaintiff) ita quod idem R. non debet ibi turbam fodere, etc., unde eum impederunt. Et quia uterque dicit se esse in seisinia de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri set breve nove disseisine bene jacet in hoc casu quia per breve nove disseisine recuperare potest dampna sua una cum tenemento, consideratum est quod breve tale non jacet in hoc casu, set perquirat sibi versus eum pro breve nove disseisine si voluerit et Rogerus (plaintiff) in misericordia pro falso clamio."

³ 1 Ed. I. Abr. Pl. 262, col. 1, rot. 18, Cant.: "Hugo de Brok implacitat Henr. fil. J. pro eo quod succidit arbores suas apud H. crescentes et alia enormia et contra pacem, etc. Henricus dicit quod ipse succidit illas arbores (?) crescentes super feodum et lib. ten. suum. Et e contra dict. Hugo dicit quod dictae arbores crescebant super ten. suum proprium et non super ten. dicti Henrici. Judicium. Et quia lib. ten. non potest per hoc breve de transgressione terminari consideratum est quod Henr. quoad hoc sine die et pred. Hugo in misericordia pro falso clamio. Et perquiret sibi breve de nova disseis. si voluerit." 1 Ed. I. Abr. Pl. 262, col. 1, rot. 19, Essex. "Item in Com. Essex Abbas de Tiltete allegat easdem exceptiones et petit judicium."

⁴ Y. B. 11 & 12 Ed. III. 503, 505; Y. B. 11 & 12 Ed. III. 517, 519; Y. B. 14 Ed. III. 230.

⁵ (1228) 2 Br. Note Book, No. 287; defendant's act amounted to ouster, but he did not claim freehold. (1221) 3 Br. Note Book, No. 1520; defendant's act amounted to disseisin, but suggested by Maitland that plaintiff (a guardian) could not have had assise. Is this so?

damages for a trespass not amounting to a disseisin.¹ Britton accordingly advises one to bring assise rather than trespass.²

"And yet it may be a trespass according to the distinction, as where he does not claim any freehold; and then the assise shall cease and be turned into a jury to inquire of the trespass and damages. But because one cannot in such case immediately discover the intention of the trespasser, the plaintiff acts prudently if he proceeds by the assise. And if the act be done a second time then the assise holds, so that the plaintiff may recover his peaceable seisin."

The defendant was liable not only for his personal entry but also for entry of his animals.³ Owners of closes had not so much need of trespass in these cases, since they might always obtain satisfaction by distraining the animals damage feasant.

In all the early cases of trespass *quare clausum fregit* the plaintiffs seem to have been freeholders. When termors acquired the right to this writ is not clear. It is probable that the writ trespass *quare clausum fregit* was given to them at about the same time with trespass for an ouster. The first case I have found is in the forty-seventh year of Edward III.,⁴ where it was assumed⁵ that the lessee for years and not the lessor was the proper plaintiff to bring trespass

¹ Bract. 216 b; 3 Tw. Br. 440. See also Fleta, 250: "Et si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseysinam, sed transgressionem. Sed quoniam incertum est quo animo hoc faciat, ideo querens sibi perquirat per assisam et quo casu querendum erit a iudice quo animo hoc fuerit, utrum eo quod jus habeat in re vel non habeat, ut si forte ductus errore probabili vel ignorantia non crassa, et ipse solus ignoraverit, non excusatur. Si autem ignorantia juste fuerit et probabilis error, et ita ingrediatur fundum alienum cum suum esse crediderit, et clam vel palam arbores succiderit, vel herbam falcaverit, sed per errorem vel ignorantium, excusatur a disseysina, quia ibi potius transgressio quam disseysina. Quam quidem si cognoverit, emendet: et si dedixerit, vertitur assisa in juratam ad inquerendum de transgressionem, et per hoc stet vel cadat. . . . Frequentia enim mutat transgressionem in disseysinam; ut si semper transgressionem faciat & respondeat ad assisam, quod nihil clamet in tenemento omnino . . . ut per hoc poenam disseysinae possit evadere, non audietur, sed sustenebit poenam disseysinae et redisseysinae. . . . Si autem dicat se jus habere cum nullum habeat vel dicat suam propriam cum sit communis, statim procedat assisa in modum assisae et per assisam terminabitur negotium."

² 1 Nich. Br. 343.

³ (1353) 27 Lib. Ass. pl. 56 is the earliest reported case.

⁴ Y. B. 47 Ed. III. 5, 11.

⁵ But see Stath. Abr. Transgressio, pl. 13, T. 47 Ed. III. (seems s. c. as 47 Ed. III. 5, 11, *supra*) that lessor may have trespass, to which STATHAM adds *Quare*. See Y. B. 21 Ed. III. 34, 23.

quare clausum fregit.¹ *Tenant at will* seems not to have possessed the right to trespass *quare clausum fregit* until a much later period than the lessee for years.²

In the eleventh year of Henry IV.,³ HANKFORD, J., said a tenant at will could not have trespass for an ouster.⁴ His right was recognized, however, in the reign of Henry VI.,⁵ and is of course unquestioned at the present time.⁶

Tenant at sufferance originally could not sue in trespass *quare clausum fregit*,⁷ but the rule is now otherwise,⁸ and to-day any possessor may have trespass *quare clausum fregit*.⁹ Thus, as early as the twenty-second year of Charles I.¹⁰ "it was likewise agreed that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease whereupon the lessee might maintain an *ejectio firmæ*." And in the tenth year of Anne, in an action of trespass for taking cattle, a demurrer to a plea that they were taken damage feasant, on the ground that defendant did not set out title to the close, was overruled on the

¹ Y. B. 47 Ed. III. 19, 40; Y. B. 48 Ed. III. 6, 10 (trespass against lessor); Y. B. 18 Hen. VI. 30 a, 2; Y. B. 8 Ed. IV. 15, 16; Y. B. 20 Ed. IV. 2, 11; Y. B. 21 Ed. IV. 3, 2.

² Y. B. 2 Hen. IV. 12, 49, a customary tenant, *i. e.*, copyholder.

³ Y. B. 11 Hen. IV. 90, 46.

⁴ See also Y. B. 21 Ed. III. 34.

⁵ Y. B. 18 Hen. VI. 1, 1; Y. B. 19 Hen. VI. 45, 94; Y. B. 38 Hen. VI. 27, 8, Br. Abr. Tr. 227, s. c. more fully reported; 40 Eliz., Knevit v. Poole, Gouldsb. 143, pl. 60, per GAWDY, J., citing 38 Hen. VI. *supra*; Heydon & Smith's Case, 13 Rep. 67, 69; 5 Com. Dig. Tr. B. 1; Geary v. Bearcroft, 1 Sid. 346, pl. 13.

⁶ Hayward v. Sedgley, 14 Me. 439; Clark v. Smith, 25 Pa. 137; and cases *infra* on question of right of landlord of tenant at will to have trespass *quare clausum fregit*.

⁷ 30 Hen. VI., Fitz. Abr. Tresp. 10; Anon., Keil. 46, pl. 2; Anon., Keil. 42, pl. 7; Tailor's Case, Clayt. 55, pl. 96.

⁸ Heydon and Smith's Case, 13 Rep. 67, 69; and see Y. B. 4 Hen. VII. 3, 6, that tenant at sufferance might succeed if defendant pleaded not guilty, but not if he pleaded a title in another. See also 5 Com. Dig. Tr. B. 1; 2 Roll. Abr. 551 (N) 1 (but citing Y. B. 9 Hen. VI. 43 b, *contra*, which is not in point); Vin. Abr. Tresp. 456 (N) 1; Doe v. Murrell, 8 C. & P. 134 (*semble*, even against landlord entering without demand).

⁹ Harker v. Birkbeck, 3 Burr. 1556, 1563, per LORD MANSFIELD; Graham v. Peate, 1 East. 244 (this case was really an innovation. Compare corresponding change in plaintiff's right in trespass *de bonis asportatis*, *supra*); Catteris v. Cowper, 4 Taunt. 547; Harper v. Charlesworth, 4 B. & C. 574; Hall v. Davis, 2 C. & P. 33; Cutts v. Spring, 15 Mass. 135; Cook v. Rider, 16 Pick. 186; Barnstable v. Thacher, 3 Met. 239; Nickerson v. Thacher, 146 Mass. 609; Slater v. Rawson, 6 Met. 439, 446; Phillips v. Kent, 3 Zab. 155; Jackson v. Harder, 4 Johns. 202; Stuyvesant v. Dunham, 9 Johns. 61; Townsend v. Kerns, 2 Watts, 180; Hughes v. Graves, 39 Vt. 359; Field v. Apple River Co., 67 Wis. 569.

¹⁰ Johnson v. Barret, Al. 10.

ground that "a possessory right is sufficient to maintain an action of trespass."¹ An equitable owner in possession may maintain trespass.²

It is to be remembered that trespass *quare clausum fregit* is not a counterpart to trespass *de bonis asportatis*. Assize of novel disseisin corresponds to the latter action. The modern trespass or case for injury to chattels corresponds to trespass *quare clausum fregit*.

Actual possession is essential to the maintenance of the action; e. g., it cannot be brought before entry by heir,³ nor by donee,⁴ nor by mortgagee,⁵ nor by lessee before actual entry,⁶ nor by surrenderee,⁷ nor by judgment creditor before execution,⁸ nor by bargainee or covenantee under statute of uses,⁹ nor by Parson before induction,¹⁰ nor by feoffor upon condition,¹¹ nor by lessor for life or years.¹² There is, however, one illustration of trespass *quare clausum fregit* by a constructive possessor, namely, by landlord of a tenant at will or sufferance.¹³ But this exception to the general doctrine which

¹ *Osway v. Bristow*, 10 Mod. 37.

² *Seventh Bank v. New York Co.*, 53 N. Y. Super. Ct. 412.

³ *Y. B. 44 Ed. III.* 18, 12, *Br. Abr. Tresp.* 46; *Com. Dig. Tr. B. 3*, cited in *Roscoe* (10 ed.), 608; *Vin. Abr. Tr.* 457-8, 463-2; *Barnett v. Guildford*, 11 Ex. 19.

⁴ *Y. B. 2 Ed. IV.* 25, 26; *Br. Abr. Tr.* 303; *Vin. Abr. Tresp.* 463, 11 (*conusee*).

⁵ *Litchfield v. Ready*, 5 Ex. 939; *Turner v. Cameron's Co.*, 5 Ex. 932, 937.

⁶ *Wheeler v. Montefiore*, 2 Q. B. 133; *Ryan v. Clark*, 14 Q. B. 65, 73 (*semble*); *Harrison v. Blackburn*, 17 C. B. N. S. 678. But see *contra*, *Y. B. 18 Hen. VI.* 1, 1, per PASTON, J.

⁷ *Vin. Abr. Tr.* 456, 9.

⁸ *Y. B. 7 Ed. IV.* 5, 14; *Br. Tr.* 312.

⁹ *Geary v. Bearcroft*, *Carter*, 57, 66, per BRIDGMAN, C. J.; *Greene v. Wallwin*, *Noy*, 73, per WAMESLEY and GLANVILLE, JJ. (*assise lies, but not trespass*); *Barker v. Keat*, 2 Mod. 249, 251; *Litchfield v. Ready*, 5 Ex. 939, 945, per PARKE, B.; *Vin. Abr. Tr.* 457, 13. But see *contra*, *Anon. Cro. El.* 46, cited in *Heelis v. Blain*, 18 C. B. N. S. 90, 106.

¹⁰ *Hare v. Bickley*, *Plow.* 526. See *Bulwer v. Bulwer*, 2 B. & Ald. 470.

¹¹ *Vin. Abr. Tresp.* 544, 7.

¹² *Y. B. 47 Ed. III.* 5, 11; *Y. B. 5 Ed. IV.* 64, *Br. Tresp.* 291; *Y. B. 22 Ed. IV.* 13, 37, *Br. Tresp.* 365; *Y. B. 13 Hen. VII.* 9, 4, *Br. Tresp.* 430; *Y. B. 14 Hen. VIII.* 23 b, *Br. Tresp.* 169; *Vin. Abr. Tr.* 457, 14; *ibid.* 529, Q. C. 3; *ibid.* 533, 10; *Browning v. Beston*, *Plowd.* 131; *Holmes v. Seely*, 19 *Wend.* 507; *Davis v. Clancy*, 3 *McCord*, 422.

¹³ *Y. B. 2 Hen. IV.* 12, 49; *Y. B. 19 Hen. VI.* 45, 94; *Litt. § 82*, *Co. Lit.* 63 b; *Geary v. Bearcroft*, *Carter*, 57, 66, per BRIDGMAN, C. J.; *Harper v. Charlesworth*, 4 B. & C. 574, 583, per HOLROYD, J.; *Com. Dig. Tr. B. 2*; 2 *Roll. Abr.* 551, 1, 46. The English rule was followed in this respect in *Starr v. Jackson*, 11 *Mass.* 519 (but see *Taylor v. Townsend*, 8 *Mass.* 411, 413, *semble, contra*); *Hingham v. Sprague*, 15 *Pick.* 102; *Cole v. Stuart*, 11 *Cush.* 181 (*mortgagee*); *Leavitt v. Eastman*, 77 *Me.* 117 (*mortgagee*); Compare *Davis v. Clancy*, 3 *McCord*, 422; but rejected in *Campbell v. Arnold*, 1 *Johns.* 511; *Clark v. Smith*, 25 *Pa.* 137.

requires actual possession no longer exists in jurisdictions where, by statute, a tenant at will has acquired the right to hold for a certain period after notice.¹ Furthermore, a landlord could in no case have trespass for a bare entry upon tenant at will or sufferance; he must prove actual damage. For a mere entry without damage only the tenant could have trespass.² It would seem that the right of the landlord of a tenant at will or sufferance to bring trespass *quare clausum fregit* against a stranger for actual injury is closely connected with his right to maintain trespass against the tenant himself for an act causing damage to the landlord, although this right is commonly explained as resulting from a fictitious extinguishment of the tenancy by the wrongful act. The landlord's right of trespass *quare clausum fregit* against the tenant is generally admitted, *e. g.*, against a tenant at will,³ or a tenant at sufferance.⁴

In this country constructive possession is sufficient to support trespass *quare clausum fregit* in another class of cases; namely, where there is no actual occupancy by any one, the true owner may have the action against one who makes a wrongful entry.⁵

A disseisee acquired a right to bring trespass for a disseisin in the reign of Edward III. Before re-entry, however, he could recover damages only for the act of disseisin and not for the mesne occupancy. The disseisor acquired the fee and his subsequent occupancy was of his own property.⁶ So a disseisee cannot before

¹ See *French v. Fuller*, 23 Pick. 104, 107.

² *Little v. Palister*, 3 Me. 6; *French v. Fuller*, 23 Pick. 104. (In *Dickinson v. Goodspeed*, 8 Cush. 119, a tenant at will succeeded against his landlord.)

³ Y. B. 21 Hen. VI. 36, 4; Br. Tr. 141; Y. B. 12 Ed. IV. 8, 20; Y. B. 22 Ed. IV. 5, 16, Br. Tr. 362; Countess of Shrewsbury's Case, 5 Rep. 13 b; *Walgrave v. Somerset*, 4 Leon. 167; *Berry v. Heard*, Cro. Car. 242, Palm. 327, s. c.; *Evans v. Evans*, 2 Camp. 491; *Page v. Robinson*, 10 Cush. 99; *Hapgood v. Blood*, 11 Gray, 400; *Phillips v. Covert*, 7 Johns. 1; *Suffern v. Townsend*, 9 Johns. 35; *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Waterman v. Matteson*, 4 R. I. 539, 543; *Kennedy v. Wheatly*, 2 Hayw. 402. See *Jewell v. Mahood*, 44 N. H. 474.

⁴ Vin. Abr. 471, 15; *West v. Treude*, Cro. Car. 187, W. Jones, 224.

⁵ *Bush v. Bradley*, 4 Day, 298, 306; *Lunt v. Brown*, 13 Me. 236; *Smith v. Wunderlich*, 70 Ill. 426; *Proprietors v. Call*, 1 Mass. 483; *Ruggles v. Sands*, 40 Mich. 559, and cases cited; *Concord v. McIntire*, 6 N. H. 527; *Chandler v. Walker*, 21 N. H. 282; *Warren v. Cochran*, 30 N. H. 379; *Van Brunt v. Schenck*, 11 Johns. 377, 385; *Wickham v. Freeman*, 12 Johns. 183; *Hubbell v. Rochester*, 8 Cow. 115; *Rowland v. Rowland*, 8 Oh. 40; *Bailey v. Massey*, 2 Swan, 167.

⁶ Y. B. 13 Hen. VII. 15, 11; *Rawlins' Case*, 1 Leon. 302; *Monckton v. Pashley*, 2 Ld. Ray. 974, 2 Salk. 638, s. c.; *Stean v. Anderson*, 4 Harr. (Del.) 209; *Smith v. Wunderlich*, 70 Ill. 426; *Shields v. Henderson*, 1 Litt. 239; *Abbott v. Abbott*, 51 Me.

re-entry maintain trespass *de bonis asportatis* against the disseisor, or trover for cutting and disposing of trees and the like.¹ And one claiming under a person holding possession by virtue of legal process which is afterwards pronounced erroneous, is not liable in trespass to him who enters under the reversal of the judgment.² An exception was, however, made in favor of a lessee after the expiration of his term, and the consequent determination of his right of entry.³ After re-entry, however, by a fictitious relation, the disseisee was permitted to recover against the disseisor damages for the whole time of his occupancy.⁴ Some judges were disposed to carry this doctrine so far as to give the disseisee after re-entry the right to bring trespass against a grantee of the disseisor for occupancy prior to re-entry;⁵ but the opposite view prevailed.⁶

Whether disseisee after re-entry could have trespass against a mesne second disseisor was left doubtful by the cases.⁷

575; *Proprietors v. Call*, 1 Mass. 483 (*semble*); *Taylor v. Townsend*, 8 Mass. 411, 415; *Allen v. Thayer*, 17 Mass. 299, 302; *Emerson v. Thompson*, 2 Pick. 473, 474; *Case v. Shepherd*, 2 Johns. Cas. 27; *Frost v. Duncan*, 19 Barb. 560; *Holmes v. Seely*, 19 Wend. 507; *Caldwell v. Walters*, 22 Pa. 378; *Rowland v. Rowland*, 8 Oh. 40; *West v. Lanier*, 9 Humph. 762; *Cutting v. Cox*, 19 Vt. 517.

¹ Y. B. 9 Ed. III. 2, 4; *Liford's Case*, 11 Rep. 46, 51 *a* (*semble*); *Bigelow v. Jones*, 10 Pick. 161 (nor money had and received for the proceeds); *Brown v. Ware*, 25 Me. 411 (*semble*); *Graham v. Houston*, 4 Dev. 232 (*semble*).

² *Menvil's Case*, 13 Rep. 21; *Case v. De Goes*, 3 Cai. 261; *Van Brunt v. Schenck*, 11 Johns. 377; *Bacon v. Sheppard*, 6 Halst. 197.

³ *Rawlins' Case*, 1 Leon. 302 (*semble*); *Smith v. Wunderlich*, 70 Ill. 426, 435; *Allen v. Thayer*, 17 Mass. 299, 302.

⁴ *Cases supra*. By Y. B. 37 Hen. VI. 7, 12, per DANBY, J., disseisee entitled to crops sown by disseisor.

⁵ Y. B. 33 Hen. VI. 46, 30, by some justices and serjeants; Y. B. 37 Hen. VI. 35, 22, FORTESCUE and DANBY, JJ.; Y. B. 13 Hen. VII. 15, 11, KEBLE and WOOD, JJ.; *Holcomb v. Rawlyns*, Cro. El. 540 (Moore, 461, Ow. III, s. c.), per POPHAM, C. J., GAWDY and FENNER, JJ. (CLENCH, J., diss.); *Morgan v. Varick*, 8 Wend. 587 (but see per THOMPSON, J., in *Case v. De Goes*, 3 Cai. 261, 262); *Emerson v. Thompson*, 2 Pick. 473, 476 (*semble*), per WILDE, J. (but see per PUTNAM, J., diss., and also Stanley v. Gaylord, 1 Cush. 536, 557, where WILDE, J., seems to have changed his opinion); *Trubbe v. Miller*, 48 Conn. 347 (defendant a *bona fide* purchaser).

⁶ Y. B. 34 Hen. VI. 30, 14, PRISOT, C. J.; Y. B. 37 Hen. VI. 35, 22, LITTLETON, SPELMAN; Y. B. 18 Ed. IV. 3, 15, LITTLETON, J.; 12 Hen. VII., Anon., Keil. 1, pl. 2; Y. B. 13 Hen. VII. 15, 11, CONSTABLE, KINGSMIL, FROWICK, and others; *Liford's Case*, 11 Rep. 46, 51 *a*; *Moore v. Hussey*, Hob. 93, 98; *Symons v. Symons*, Hetley, 66; *Barnett v. Guildford*, 11 Ex. 19, 30, per PARKE, B.; *Dewey v. Osborn*, 4 Cow. 329, 338.

⁷ Against the action: Y. B. 2 Ed. IV. 18, 12, per CROKE, C. J.; Y. B. 13 Hen. VII. 15, 11, by all the judges except WOOD and VAVASOR, JJ.; *Liford's Case*, 11 Rep. 46, 51 *a*; *Wickham v. Freeman*, 12 Johns. 183, 4. In favor of the action: Y. B. 19 Hen.

C. ASSIZE OF NUISANCE.

The assize of novel disseisin and trespass for ouster or *quare clausum* furnished adequate remedies for wrongs to plaintiff committed by the defendant upon the plaintiff's land. But there are many ways of injuring the plaintiff's property in land without an entry thereon. The remedy for such injuries was (1) Abatement by act of party,¹ and (2) The assize for nuisance.

This was probably coeval with assize of novel disseisin. Glanvil gives two writs for raising or throwing down a dyke, or for raising a pond to damage of plaintiff's freehold. There are many cases in the *Abbreviatio Placitorum*, for raising dykes and ponds, for stopping or directing the flow of water, for erecting gallows, for setting up a market, or fair, for obstructing a way. The judgment was for damages and that the nuisance be abated, and the sheriff abated it if the defendant refused. As in assize of disseisin there was no remedy against an alienee of the disseisor by assize of nuisance, but by writ of *quod permittat prosternere*, analogous to a writ of right. The alienee in each case was guilty of no tort. The plaintiff was simply entitled to the enjoyment of his freehold free from nuisance, which the *quod permittat* gave him without damages.

By Statute of Westminster II.² an assize of nuisance was given against an alienee of the creator of the nuisance.³

Assize of nuisance like all assizes could be brought only by a freeholder.⁴

Termors and other possessors were without remedy⁵ until after the Statute Westminster II.⁶ which introduced the action on the case. Trespass on the case was allowed theoretically only when none

VI. 28 b, 49, per NEWTON, J.; Y. B. 2 Ed. IV. 18, 12, per DANBY, J., agreeing with LITTLETON; Holcomb v. Rawlins, Cro. El. 540 (*semble*); Emerson v. Thompson, 2 Pick. 473, 485 (*semble*), per WILDE, J.

¹ Abatement by act of party must be speedy, as in the corresponding case of disseisin by ouster. Bract. 233; 3 Tw. Br. 565; 1 Nich. Br. 403. But in modern times abatement need not be speedy, just as the right of entry was extended.

² 13 Ed. I. c. 24.

³ Compare with Statute of Gloucester, giving remedy against alienee of disseisor, *supra*.

⁴ See Fitz. Nat. Br. 184 g, *accord*.

⁵ In case of a lease for years lessor had assize of nuisance, 3 Br. Note Book, 23 Hen. III., Fitz. Abr. Assize, 437; Heir before entry: 25 El., Russell v. Handford, 1 Leon. 273, pl. 368.

⁶ 13 Ed. I. c. 24.

of the original writs gave adequate relief. Accordingly originally, case would not lie if plaintiff might have assise or *quod permittat*.¹ Plaintiff seems afterward to have brought *quod permittat*.² If assise would not lie plaintiff injured by a nuisance had case,³ as where plaintiff was not a freeholder,⁴ or where the interference with plaintiff's right was partial only,⁵ or where interference was by one not a freeholder.⁶

The Court of King's Bench⁷ allowed case even where an assise would lie as early as the reign of Elizabeth,⁸ and it was finally settled by the Exchequer Chamber that plaintiff might have case or assise at his option.⁹ Subsequent cases confirmed this decision.¹⁰

¹ Y. B. 2 Hen. IV. 11, 48, obstruction of way; Y. B. 11 Hen. IV. 83, 28; Y. B. 22 Hen. VI. 14 & 15, 23; Y. B. 20 Hen. VII. 9, 18; Y. B. 14 Hen. VIII. 31, 8; 8 El. (C. B.), *Yevance v. Holcomb*, Dy. 250, pl. 88; Anon., 3 Leon. 13, 4 Leon. 167, 4 Leon. 224, s. c.; 15 El., *Hornedon v. Paine*, Bend., ed. 1689, 223; Anon., 2 And. 7, pl. 5, herbage of custodian of park; 38 El., *Wade v. Braunche*, 2 And. 53, pl. 39, obstruction of way; 38 El. (C. B.), *Beswick v. Cunden*, Cro. El. 520, Moore, 449, s. c.

² *Bestwick and Camden*, Noy, 68.

³ 19 R. II., Fitz., *Accion sure le case* 51, Disturbance of plaintiff's office.

⁴ Y. B. 9 Ed. IV. 35 b, pl. 10, per DANBY, C. J.; 8 El., Anon., 3 Leon. 13, agreed by court (termor); 32, 33 El., *Westbourne v. Mordant*, Cro. El. 191; Vin. Abr. Nuisance, K. 2, s. c. (lessee for year); 10 Jac., *Marys's Case*, 9 Rep. 111 b (copyholder); 9 Car., *Symonds v. Seabourne*, Cro. Car. 325. So the owner of a way in gross had case and not assise: Y. B. 11 Hen. IV. 26, 48. It is noticeable that there are no early instances of case by a termor. No allusion to termor's right to have case occurs earlier than Y. B. 9 Ed. IV. 35 b, pl. 10. But of course termor could abate the nuisance.

⁵ Y. B. 33 Hen. VI. 26, 10; Y. B. 14 Hen. VIII. 31, 8 (was Y. B. 21 Hen. VII. 30, 5 a similar case?); 28, 29 El., *Giles's Case*, 2 Leon. 180, pl. 222.

⁶ Y. B. 33 Hen. VI. 26, 10, per PRISOT, C. J.; Y. B. 22 Hen. VI. 15, 23, per MOYLE; and see *Cantrel v. Church*, Cro. El. 845.

⁷ King's Bench was always zealous in extending scope of Trespass on Case, as it thereby acquired jurisdiction by original writ, instead of being confined to procedure by bill.

⁸ 28, 29 El., *Sly v. Mordant*, 1 Leon. 247, pl. 333, flooding land; 32 El., *Leverett v. Townsend*, 2 Leon. 184, Cro. El. 198, plowing up common; 37 El., *Beswick v. Cunden*, Cro. El. 402, flooding land; 38 El., *Alston v. Pamphyn*, Cro. El.* 466, s. c. Dy. 250, pl. 88 n. (28 El., but doubtless a misprint for 38), stopping way.

⁹ 43 El., *Cantrel v. Church*, Cro. El. 845, Noy, 37, s. c., stopping way.

¹⁰ 2 Jac., *Gamsford v. Nightingale*, Noy, 112; 3 Jac. (B. R.), *Gainsford's Case*, 1 Roll. Abr. 104 (L), 6 (*Quere* s. c. as preceding); 8 Jac., *Pollard v. Casy*, 1 Bulstr. 47, Dy. 250, pl. 88 n., s. c.; 10 Jac., *Kirbie's Case*, 1 Roll. Abr. 104 (L), 9; 8 Jac., *Earl of Shrewsbury's Case*, 9 Rep. 46, 51 a, disturbance of office; 11 Jac., *Collocote v. Tucker*, 1 Roll. Abr. 104 (L) 6; 15 Jac., Anon., 1 Roll. Abr. 104 (L), 5 and 6; 1649, *Ayre v. Pyncomb*, Sty. 164, Election, "although ancient books say the contrary," per ROLLE, C. J.

LECTURE XX.

THE ORIGIN OF USES.

IN his well-known essay, "Early English Equity,"¹ Mr. Holmes agrees with Mr. Adams,² that the most important contribution of the chancery has been its procedure. But he controverts "the error that its substantive law is merely the product of that procedure," and maintains that "the chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system." In support of these views he brings forward as his chief evidence feoffments to uses. He gives a novel and interesting account of the origin of uses, which seems to him to make it plain that "the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with."

The acceptance of these conclusions would be difficult for any one who has studied his equity under the guidance of Professor Langdell. Moreover, time has strengthened the conviction of the present writer that the principle "Equity acts upon the person" is, and always has been, the key to the mastery of equity. The difference between the judgment at law and the decree in equity goes to the root of the matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages because they are his.³ Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is

¹ 1 L. Quar. Rev. 162.

² Adams, Equity, Intro. xxxv.

³ In the action of account, although the final judgment is that the plaintiff recover the amount found due by the auditors, the interlocutory judgment, it is true, is personal, that the defendant account (*quod computet*). It is significant that this solitary exception in the common law is a judgment against a fiduciary, a trustee of money who by the award of the auditors is transformed into a debtor.

because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make pecuniary compensation for his wrong. It is this higher standard that equity enforces, when the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy. Instances of the exclusive jurisdiction of equity are found among the earliest bills in chancery. For example, bills for the recovery of property got from the plaintiff by the fraud of the defendant;¹ bills for the return of the consideration for a promise which the defendant refuses to perform;² bills for reimbursement for expenses incurred by the plaintiff in reliance upon the defendant's promise, afterwards broken;³ bills by the bailor for the recovery of a chattel from a defendant in possession of it after the death of the bailee.⁴

In most of these cases, it will be seen, the plaintiff is seeking restitution from the defendant, who is trying to enrich himself

¹ *Bief v. Dier*, 1 Cal. Ch. XI. (1377-1399); *Brampton v. Seymour*, 10 Seld. Soc'y, Sel. Cas. Ch. No. 2 (1386); *Grymmesby v. Cobham*, *ibid.*, No. 61 (Hen. IV.?); *Flete v. Lynster*, *ibid.*, No. 119 (1417-1424); *Stonehouse v. Stanshawe*, 1 Cal. Ch. XXIX. (1432-1443).

² *Bernard v. Tamworth*, 10 Seld. Soc'y, Sel. Cas. Ch., No. 56 (Hen. IV?); *Appilgarth v. Sergeantson*, 1 Cal. Ch. XLI. (1438); *Gardynere v. Kecke*, 4 *The Antiquary*, 185, s. c. 3 *Green Bag*, 3 (1452-1454).

³ *Wheler v. Huchynnden*, 2 Cal. Ch. II. (1377-1399); *Wace v. Brasse*, 10 Seld. Soc'y, Sel. Cas. Ch., No. 40 (1398); *Leinster v. Narborough*, 5 *The Antiquary*, 38, s. c. 3 *Green Bag*, 3 (cited 1480); *James v. Morgan*, 5 *The Antiquary*, 38, s. c. 3 *Green Bag*, 3 (1504-1515).

⁴ *Farendon v. Kelseye*, 10 Seld. Soc'y, Sel. Cas. Ch. No. 109 (1407-1409); *Harleston v. Caltoft*, 10 Seld. Soc'y, Sel. Cas. Ch., No. 116 (1413-1417).

unconscionably at the expense of the plaintiff. Certainly in these instances of early English equity, chancery was giving effect to an enlightened sense of justice, and in so doing, was supplying the defects of the more archaic system of the common law. Nor, although the decrees in these cases are not recorded, can there be any doubt that the equitable relief was given in early times, as in later times, by commanding the obedience of the defendant.¹

Is it possible that what is true of the early equity cases just considered is not also true of the equitable jurisdiction of uses? Let us examine the arguments to the contrary brought forward in the essay upon Early English Equity. Those arguments may be summarized as follows. The feoffee to uses corresponds, point by point, to the *Salman* or *Treuhand* of the early German law. The natural inference that the English feoffee to uses is the German fiduciary transplanted is confirmed by the facts that the continental executor was the *Salman* or *Treuhand* modified by the influence of the Roman law, and that there is no doubt of the identity of the continental executor and the English executor of Glanville's time. Although the *cestui que use* did not have the benefit of the common law possessory actions, he could, if the feoffor, take a covenant from the feoffee, and might, if not the feoffor, have the assistance of the ecclesiastical court. So that for a considerable time both feoffors and other *cestuis que use* were well enough protected. But the ecclesiastical court was not able to deal with uses in the fulness of their later development, and the chancellors carried out as secular judges the principles which their predecessors had striven to enforce in the spiritual courts.

It may be conceded that the feoffee to uses, down to the beginning of the fifteenth century, was the German *Salman* or *Treuhand* under another name. It is common learning, too, that bequests of personalty were enforced for centuries by suits against the executors in the ecclesiastical courts. It is possible, although no instance has been found, that devisees of land, devisable by custom in cities

¹ In *Brampton v. Seymour* (1386), *supra*, p. 234, n. 1, in the writ, *Quibusdam certis de causis*, the defendant is ordered "to appear and answer and further to do whatever shall be ordained by us." In *Farendon v. Kelseye* (1407-1409), *ibid.*, n. 4, the decree was that the defendant "should deliver them [title deeds] to him." In *Appilgarth v. Sergeantson* (1438), *ibid.*, n. 2, the prayer of the bill is "to make him do as good faith and conscience will in this part." See similar prayers in *Bernard v. Tamworth* (1399-1413), *ibid.*, n. 2; *Stonehouse v. Stanshawe* (1432-1443), *ibid.*, n. 1.

and boroughs, at one time proceeded against the executor in the spiritual court.¹ If this practice ever obtained, it disappeared with the reign of Edward I., the devisee recovering the land devised by a real action in the common law court of the city or borough. That the ecclesiastical court ever gave relief against the feoffee to uses is to the last degree improbable. The suggestion to the contrary² is wholly without support in the authorities.³ Nor has any case been found in which the feoffor obtained relief against the feoffee to uses on the latter's covenant to perform the use. Such a covenant, it is true, is mentioned in one or two charters of feoffment, but such instances are so rare that the remedy by covenant may fairly be said to have counted for nothing in the development of the doctrine of uses. If, indeed, a feoffment to uses was subject to a condition that the land should revest in the feoffor if the feoffee failed to perform the trust, the feoffor or his heir, upon the breach of this condition subsequent, might enter, or bring an action at common law for the recovery of the land. Only the feoffor or his heir could take advantage of the breach of the condition,⁴ and the enforcement of the condition was not the enforcement of the use, but of a forfeiture for its non-performance. Moreover, such conditions seem not to have been common in feoffments to uses, the feoffors trusting rather to the fidelity of the feoffees. We find in the books many references to uses of lands, from the latter part of the twelfth to the beginning of the fifteenth century, but no intimation of any right of the intended beneficiary to proceed in court against the feoffee.⁵ But the evidence against such a right is not

¹ In 1 Nich. Britt. 70 n. (f) the annotator, a contemporary of Britton, says that the king has of necessity jurisdiction of customary devises of land as of a thing annexed to freehold. "For though the spiritual judge had cognizance of such tenements so devised, he would have no power of execution, and testament in such cases is in lieu of charter."

² Early Eng. Eq., 1 L. Quar. Rev. 168.

³ In an undated but early petition, *Horsmonger v. Pympe*, 10 Seld. Soc'y, Sel. Cas. Ch. No. 123, the *cestui que use* under a feoffment prays that the feoffee to uses be summoned to answer in the King's Chancery, "which is the court of conscience," since he "cannot have remedy by the law of the Holy Church nor by the common law."

⁴ Y. B. 10 Hen. IV. f. 3, pl. 3.

⁵ In a valuable "Note on the Phrase *ad opus* and the Early History of the Use" in 2 Pollock and Maitland, *Hist. of Eng. Law*, 232 *et seq.*, the reader will find the earliest allusions to uses of land in England. See also Bellewe, *Collusion*, 99 (1385); Y. B. 12 Ed. III. (Rolls ed.), 172; Y. B. 44 Ed. III. 25 b, pl. 34; Y. B. 5 Hen. IV. f. 3, pl. 10; Y. B. 7 Hen. IV. f. 20, pl. 1; Y. B. 9 Hen. IV. f. 8, pl. 23; Y. B. 10 Hen. IV. f. 3,

merely negative. In 1402 a petition to Parliament by the Commons prays for relief against disloyal feoffees to uses because "in such cases there is no remedy unless one be provided by Parliament."¹ The petition was referred to the King's Council, but what further action was taken upon it we do not know. But from about this time bills in equity became frequent.² It is a reasonable inference that equity gave relief to *cestuis que use* as early as the reign of Henry V. (1413-1422), although there seems to be no record of any decree in favor of a *cestui que use* before 1446.³ The first decree for a *cestui que use*, whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law of to-day. The feoffee to uses, so long as his obligation was merely honorary, may properly enough be identified with the German Salman or Treuhander. But the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development.⁴

There is no reason to doubt that this development was brought about by the same considerations which moved the chancellor to give relief in the other instances of early equity jurisdiction. The

pl. 3; Y. B. 11 Hen. IV. f. 52, pl. 30. The earliest statutes relating to uses are 50 Ed. III. c. 6; 1 Rich. II. c. 9; 2 Rich. II. St. 2, c. 3; 15 Rich. II. c. 5; 21 Rich. II. c. 3.

¹ 3 Rot. Parl. 511, No. 112.

² The earliest bills of which we have knowledge are the following, arranged in chronological order to the end of the reign of Henry VI.: Godwyne v. Profyt, 10 Seld. Soc'y, Sel. Cas. Ch. No. 45 (after 1393); Holt v. Debenham, *ibid.*, No. 71 (1396-1403); Chelmewyke v. Hay, *ibid.*, No. 72 (1396-1403); Byngeley v. Grymesby, *ibid.*, No. 99 (1399-1413); Whyte v. Whyte, *ibid.*, No. 100 (1399-1413); Dodd v. Browing, 1 Cal. Ch. XIII. (1413-1422); Rothenhale v. Wynchingham, 2 Cal. Ch. III. (1422); Messynden v. Pierson, 10 Seld. Soc'y, Sel. Cas. Ch. No. 117 (1417-1424); Williamson v. Cook, *ibid.*, No. 118 (1417-1424); Huberd v. Brasyer, 1 Cal. Ch. XXI. (1429); Arundell v. Berkeley, 1 Cal. Ch. XXXV. (1435); Rous v. FitzGeffrey, 10 Seld. Soc'y, Sel. Cas. Ch. No. 138 (1441); Myrfyne v. Fallan, 2 Cal. Ch. XXI. (1446); Felubrigge v. Damme and Sealis v. Felbrigge, 2 Cal. Ch. XXIII. and XXVI. (1449); Saundre v. Gaynesford, 2 Cal. Ch. XXVIII. (1451); Anon., Fitzh., Abr. Subp., pl. 19 (1453); Edlyngton v. Everard, 2 Cal. Ch. XXXI. (1454); Breggeland v. Calche, 2 Cal. Ch. XXXVI. (1455); Goold v. Petit, 2 Cal. Ch. XXXVIII. (1457); Anon., Y. B. 37 Hen. VI. f. 35, pl. 23; Walwine v. Brown, Y. B. 39 Hen. VI. f. 26, pl. 36; Furby v. Martyn, 2 Cal. Ch. XL. (1460).

³ Myrfyne v. Fallan, 2 Cal. Ch. XXI.

⁴ The beneficiary had no action to compel the performance of the duty of the continental Salman. Schulze, Die Langobardische Treuhander, 145; 1 L. Quar. Rev. 168. Caillemier, L'Exécution Testamentaire, c. IX., expresses a different opinion. But it is certain that nothing corresponding to the English use was developed on the Continent.

spectacle of feoffees retaining for themselves land which they had received upon the faith of their dealing with it for the benefit of others was to be repugnant to the sense of justice of the community to be endured. The common law could give no remedy, for by its principles the feoffee was the absolute owner of the land. A statute might have vested, as the Statute of Uses a century later did vest, the legal title in the *cestui que use*. But in the absence of a statute the only remedy for the injustice of disloyal feoffees to uses was to compel them to convey the title to the *cestui que use* or hold it for his benefit. Accordingly the right of the *cestui que use* was worked out by enforcing the doctrine of personal obedience.¹ It is significant that in the oldest and second oldest abridgments there is no title of "Uses" or "Feffements al uses." In Statham one case of a use is under the title "Conscience" and the others under "Subpena." In Fitzherbert all the cases are under the title "Subpena."²

It must have been all the easier for the chancellor to allow the subpoena against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use³ of a third person, or to be redelivered to the person from whom he had received the chattels or the money. In the case of chattels the bailor could, of course, maintain detinue against a bailee who broke his agreement to redeliver. But the same action was allowed in favor of a third person when the bailment was for

¹ The earliest decree that we have directed the defendant to make a conveyance. *Myrfyne v. Fallan*, *supra*, p. 265, n. 2 (1446). See the prayers in the following cases: *Holt v. Debenham*, *ibid.*, (1396-1403), "to do what right and good faith demand"; *Byngeley v. Grymesby*, *ibid.* (1399-1413), "answer and do what shall be awarded by the Council"; *White v. White*, *ibid.* (1399-1413), "to restore profits of the land"; *Williamson v. Cook*, *ibid.* (1417-1424), "to oblige and compel defendant to enfeoff plaintiff"; *Arundell v. Berkeley*, *ibid.* (1435), "to compel them to make a sufficient and sure estate of said manors to said besecher."

² By the middle of the fifteenth century subpoena was used in the sense of a bill or suit in equity. *Fitzh. Abr. Subp.* 19 (1453), "I shall have a subpoena against my feoffee"; *Y. B.* 37 Hen. VI. f. 35, pl. 23 (1459), "An action of subpoena," &c.; *Y. B.* 39 Hen. VI. f. 26, pl. 36 (1461), "A subpoena was brought in chancery."

³ Bailment of chattels to the use of a third person. *Y. B.* 18 Hen. VI. f. 9, pl. 7. Delivery of money to the use of a third person. *Y. B.* 33 & 35 Ed. I. 229; *Y. B.* 36 Hen. VI. f. 9, 10, pl. 5; *Clark's Case*, *Godb.* 210; *Harris v. De Bervoir*, *Cro. Jac.* 687. The count for money had and received by B. to the use of A. is a familiar illustration of this usage.

his benefit.¹ So in the case of money the fiduciary was not only liable in account to him who entrusted him with the money, but also to the third person if he received it for the benefit of that person.²

As the chancellor, in giving effect to uses declared upon a feoffment, followed the analogy of the common law bailment of chattels, or the delivery of money upon the common law trust, so, in enforcing the use growing out of a bargain and sale, he followed another analogy of the common law, that of the sale of a chattel. The purchaser of a chattel, who had paid or become indebted for the purchase money, had an action of detinue against the seller. Similarly the buyer of land who had paid or become a debtor for the price of the land, was given the right of a *cestui que use*. But the use by bargain and sale was not enforced for about a century after the establishment of the use upon a feoffment. In 1506 REDE, J., said: "For the sake of argument I will agree that if one who is seised to his own use sells the land, he shall be said to be a feoffee to the use of the buyer."³ But TREMAILE, J., in the same case dissented vigorously, saying: "I will not agree to what has been said, that, if I sell my land, I straightway upon the bargain and money taken shall be said to be a feoffee to the use of the buyer; for I have never seen that an estate of inheritance may pass from the one seised of it except by due formality of law as by livery or fine or recovery; by a bare bargain I have never seen an inheritance pass." Just how early in the reign of Henry VIII. the opinion of REDE, J., prevailed is not clear, but certainly before the Statute of Uses.⁴ Equity could not continue to refuse relief to the buyer of land against a seller who, having the purchase money in his pocket, refused to convey, when under similar circumstances the buyer of a chattel was allowed to sue at law. The principle upon which equity proceeded is well expressed in "A

¹ Y. B. 34 Ed. I. 239 (*semble*); Y. B. 39 Ed. III. f. 17 a; Y. B. 3 Hen. VI. f. 43, pl. 20, and several other cases cited in Ames, *Cas. on Trusts*, 2d ed., 52, n. 1.

² Fitzh. Abr. Acct. 108 (1359); Y. B. 41 Ed. III. f. 10, pl. 5 (1367); Bellewe, Acct. 7 (1379); Y. B. 1 Hen. V. f. 11, pl. 21; Y. B. 36 Hen. VI. f. 9, 10, pl. 5; Y. B. 18 Ed. IV. f. 23, pl. 5, and several other cases cited in Ames, *Cas. on Trusts*, 2d ed., 4, n. 1, n. 2.

³ Anon., Y. B. 21 Hen. VII. f. 18, pl. 30.

⁴ Bro. Abr. Feff. al Uses, pl. 54 (1533); Anon., Y. B. 27 Hen. VIII. f. 5, pl. 15 (1536), per SHELLEY, J.; Anon., Y. B. 27 Hen. VIII. f. 8, pl. 22 (1536). See also Bro. Abr. Conscience, pl. 25 (1541); Bro. Abr. Feff. al Uses, pl. 16 (1543).

Little Treatise concerning Writs of Subpœna,"¹ written shortly after 1523: "There is a maxim in the law that a rent, a common, annuity and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be perceived of his lands in D., &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and thereupon inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna."

The reader will have noted the distinction taken in this quotation between the oral grant for value and the parol gratuitous grant. In the latter case there was neither glaring injustice nor a common law analogy in the treatment of a similar grant of chattels or money to warrant the intervention of equity. Further evidence that equity never enforced gratuitous parol undertakings is to be found in this remark of counsel in 1533: "By Hales, a man cannot change (*i. e.*, create) a use by a covenant² which is executed before, as to covenant to be seised to the use of W. S. because that W. S. is his cousin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration present or future, for the same purpose, as for one hundred pound paid for the land *tempore conventionis*, or to be paid at a future day, or for to marry his daughter, or the like."³ It is evident from these authorities that equity in refusing relief upon gratuitous parol undertakings, or upon promises given only upon a past consideration, was simply following the common law, which regarded all such undertakings

¹ Doct. & St., 18th ed., Appendix, 17; Harg. L. Tr. 334.

² The word covenant was used at this time not in the restricted sense of undertaking under seal, but meant agreement in the widest sense. See 2 Harv. L. Rev. 11, n. 1, and also Wheeler v. Huchynsden, 2 Cal. Ch. II.; Wace v. Brasse, 10 Seld. Soc'y, Sel. Cas. Ch. No. 40; Sharrington v. Strotton, Plowd. 298, *passim*; s. c. Ames, Cas. on Trusts, 2d ed., 109.

³ Bro. Abr. Feff. al Uses, 54, March's translation, 95.

or promises as of no legal significance whether relating to land, chattels, or money.

But grants of chattels and money, although gratuitous, were operative at common law, if in the form of instruments under seal. The donee in a deed of gift of chattels could maintain detinue against the donor who withheld possession of them. The grant or promise by deed of a definite amount of money created a legal debt, enforceable originally by an action of debt, and in later times by an action of covenant also.¹ If, as we have seen, equity enforced the use upon a feoffment or sale of land after the analogy of the bailment of a chattel (or trust of money), and the sale of a chattel, why, it may be asked, did not the chancellor create a use in favor of the donee of land by deed of gift after the analogy of the deed of gift of chattels or money? Chancery, it is conceived, might, without any departure from principle, have taken this step and treated every donee of land by deed of grant as a *cestui que use*. But to one who keeps in mind the jealousy with which the common law judges regarded the growing jurisdiction of the chancellor, it is not surprising that for the most part equity declined to enforce gratuitous instruments under seal. There was, however, one class of gratuitous grants of land by deed in which equity created a use in favor of the donee; namely, grants or covenants to stand seised to the use of a blood relation, or of one connected by marriage.² These uses are commonly said to arise in consideration of blood or marriage. But consideration in such cases is not used in its normal sense of the equivalent for a promise, but in the general sense of reason or inducement for the agreement to stand seised. The exception in favor of those related by blood or marriage had in truth nothing to do with the doctrine of consideration and was established in the interest of the great English families. The aristocratic nature of this doctrine is disclosed in the following extract from Bacon's Reading on the Statute of Uses:³ "I would have one case showed by men learned in the law where there is a deed and yet there needs a consideration . . . and therefore in 8 Reginae [Sharrington v. Strotton, Plowd. 298] it is solemnly argued that a deed should raise an use without any other con-

¹ 2 Harv. L. Rev. 56.

² Sharrington v. Strotton, Plowd. 298 (1565), was the first case of the kind.

³ Rowe's ed., 13, 14; 7 Spedding's Bacon, 1879 ed., 403, 404.

sideration . . . And yet they say that an use is a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, tho' the interest appear never so clearly where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

LECTURE XXI.

THE ORIGIN OF TRUSTS.¹

"THE strange doctrine of Tyrrel's Case."² "The object of the legislature appears to have been the annihilation of the common law use. The courts, by a strained construction of the statute, preserved its virtual existence."³ "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to."⁴ "This doctrine must have surprised every one who was not sufficiently learned to have lost his common sense."⁵ Such are a few of the many criticisms passed upon the common law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's Case was due to "the absurd narrowness of the courts of law"; that the liberality of the chancellor at once corrected the error of the judges by supporting the second use as a trust; and "by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance."⁶

This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's Case was older than the Statute of Uses, — presumably, therefore, a chancery doctrine, — and that the statute so far accomplished its purpose that for a century there was no such thing as the separate existence in any form of the equitable use in land.

The first of these propositions is proved by a case of the year 1532, four years before the Statute of Uses, in which it was agreed by the Court of Common Bench that "where a rent is reserved,

¹ First printed in the "Green Bag," vol. iv, p. 81.

² Digby, Prop., 2d ed., 291.

³ Cornish, Uses, 41, 42.

⁴ Sugden, Gilbert, Uses, 347, n. 1.

⁵ Williams, Real Prop., 13th ed., 162.

⁶ Hopkins v. Hopkins, 1 Atk. 591, per LORD HARDWICKE. See also Leake, Prop. 125; 1 Hayes, Convey., 5th ed., 52; 1 Sanders, Uses, 2d ed., 200; 1 Cruise, Dig., 4th ed., 381; 2 Bl. Comm. 335; 1 Spence, Eq. Jurisp., 490.

there, though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it for his own use; and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use; this is a void limitation of the use; for the law, by the consideration of money, makes the land to be in the vendee."¹ Neither here nor in Benloe's report of Tyrrel's Case² is the reason for the invalidity of the second use fully stated. Nor does Dyer's reason, "because an use cannot be ingendered of an use,"³ enlighten the reader. But in Anderson's report we are told that "the bargain for money implies thereby a use, and the limitation of the other use is merely contrary."⁴ And in another case in the same volume the explanation is even more explicit: "The use is utterly void because by the sale for money the use appears; and to limit another (although the second use appear by deed) is merely repugnant to the first use, and they cannot stand together."⁵ The second use then being a nullity, both before and after the Statute of Uses, that statute could not execute it, and the common law judges are not justly open to criticism for so deciding.

Nor is there any evidence that the second use received any recognition in chancery before the time of Charles I. Neither Bacon nor Coke intimates in his writings that a use upon a use might be upheld as a trust. Nor is there any such suggestion in the cases which assert the doctrine of Tyrrel's Case.⁶ There is, on

¹ Bro. Abr. Feff. al Uses, 40; *ibid.*, 54; Gilbert, Uses, 161 *accord*.

² Benl., 1669 ed., 61.

³ Dyer, 155, pl. 20.

⁴ 1 And. 37, pl. 96.

⁵ 1 And. 313. See also 2 And. 136, and *Daw v. Newborough*, Comyns, 242: "For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use." See also *Crompton, Courts*, f. 62 a.

This notion of repugnancy explains also why, in the case of a conveyance to A., to the use of A., to the use of B., the statute does not operate at all. The statute applies only to the chancery use, which necessarily implies a relation between two persons. But A.'s use in the case put is obviously not such a use, and therefore not executed. The words "to the use of A." mean no more than for the benefit of A. But it is none the less a contradiction in terms to say in the same breath that the conveyance is for the benefit of A. and for the use of B. B.'s repugnant use is therefore not executed by the statute. *Anon.*, Moore, 45, pl. 138; *Whetstone v. Bury*, 2 P. Wms. 146; *Atty.-Gen. v. Scott*, Talb. 138; *Doe v. Passingham*, 6 B. & C. 305. The opinion of Sugden to the contrary in his *Treatise on Powers*, 7th ed., 163-165, is vigorously and justly criticised by Prof. James Parsons in his "Essays on Legal Topics," 98.

⁶ Bro. Abr. Feff. al Uses, pl. 54; *Anon.*, Moore, 45, pl. 138; *Dillon v. Freine*, Poph.

the other hand, positive evidence to the contrary. Thus, in *Crompton, Courts*:¹ "A man for £40 bargains land to a stranger, and the intent was that it should be to the use of the bargainor, and he in this court [chancery] exhibits his bill here, and he cannot be aided here against the feoffment [bargain and sale?] which has a consideration in itself, as HARPER, Justice, vouched the case." HARPER was judge from 1567 to 1577.

As the modern passive trust, growing out of the use upon a use, is in substance the same thing as the ancient use, it would seem to be forfeitable under the Stat. 33 Henry VIII., c. 20, § 2, by which "uses" are forfeited for treason. LORD HALE was of this opinion, which is followed by Mr. Lewin and other writers. But it was agreed by the judges about the year 1595 that no use could be forfeited at that day except the use of a chattel or lease, "for all uses of freehold are, by Stat. 27 Henry VIII., executed in possession, so no use to be forfeited."² There is also a *dictum* of the Court of Exchequer of the year 1618, based upon a decision five years before, that a trust of a freehold was not forfeitable under the Stat. 33 Henry VIII. LORD HALE and Mr. Lewin find great difficulty in understanding these opinions.³ If, however, the modern passive trust was not known at the time of these opinions, the difficulty disappears; for the freehold trust referred to must then have been a special or active trust, which was always distinct from a use,⁴ and therefore neither executed as such by the Statute of Uses nor forfeitable by Stat. 33 Henry VIII.

In *Finch's Case*,⁵ in chancery, it was resolved, in 1600, by the two Chief Justices, Chief Baron, and divers other justices, that "if a man make a conveyance, and expresse an use, the party himself or his heirs shall not be received to averre a secret trust, other than the expresse limitation of the use, unless such trust or confidence doe appear in writing, or otherwise declared by some apparent matter." But the trust here referred to was probably the special

81; *Stoneley v. Bracebridge*, 1 Leon. 6; *Read v. Nash*, 1 Leon. 148; *Girland v. Sharp*, Cro. El. 382; *Hore v. Dix*, 1 Sid. 26; *Tippin v. Cosin*, Carth. 273.

¹ F. 54 a; S. C. Cary, 19, where the reporter adds: "And such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel."

² 1 And. 294.

³ Lewin, *Trusts*, 8th ed., 819.

⁴ Bacon, *Stat. of Uses*, Rowe's ed., 8, 9, 30; 1 Sanders, *Uses*, 5th ed., 2, 3; 1 Coke, 139 b, 140 a.

⁵ Fourth Inst., 86.

or active trust, and not the passive trust. The probability becomes nearly a certainty in the light of the remark of Walter, *arguendo*, twenty years later, in *Reynell v. Peacock*.¹ "A bargain and sale and demise may be upon a secret trust, but not upon a use." And the case of *Holloway v. Pollard*² is almost a demonstration that the modern passive trust was not established in 1605. This was a case in chancery before Lord Chancellor ELLESMERE, and the defendant failed because his claim was nothing but a use upon a use.

Mr. Spence and Mr. Digby cite the following remark of COKE in *Foord v. Hoskins*,³ as showing that chancery had taken jurisdiction of the use upon a use as early as 1615: "If *cestuy que use* desires the *feoffees* to make an estate over and they so to do refuse, for this refusal an action on the case lieth not, because for this he hath his proper remedy by a subpoena in Chancery." "It seems," says Mr. Digby, "that this could only apply to a use upon a use."⁴ But if the *cestuy que use* here referred to were the second *cestuy*, he would not proceed against the *feoffees*, for the Statute of Uses would have already transferred the legal estate from them to the first *cestuy*. It would seem that COKE was merely referring to the old and familiar relation of *cestuy que use* and *feoffees* to use as an analogy for the case before him, which was an action on the case by a copy-holder against the lord for not admitting him.

The earliest reported instance in which a use upon a use was supported as a trust seems to have been *Sambach v. Dalton*, in 1634, thus briefly reported in Tothill:⁵ "Because one use cannot be raised out of another, yet ordered, and the defendant ordered to passe according to the intent." The conveyance in this case was probably gratuitous. For in the "Compleat Attorney," published in 1666, this distinction is taken: "If I, without any consideration, bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use), it seems the court will order this. But if it was in consideration of money by him paid, here (it seems) the express use is void, both in law and equity."⁶ On the next page of this same book the

¹ 2 Rolle, 105. See also Crompton, Courts, 58, 59.

² Moore, 761, pl. 1054.

³ 2 Bulstr. 336, 337.

⁴ Digby, Prop., 3d ed., 328. See 1 Spence, Eq. Jurisp., 491.

⁵ Page 188; s. c. Shep. Touch. 507.

⁶ Page 265. Compare pages 507 also and 510 of Shep. Touch.

facts of Tyrrel's Case are summarized with the addition: "Nor is there, as it seems, any relief for her [the second *cestuy que use*] in this court in a way of equity, because of the consideration paid; but if there was no consideration, on the contrary, Tothill, 188." As late as 1668, in *Ash v. Gallen*,¹ a chancery case, it was thought to be a debatable question whether on a bargain and sale for money to A. to the use of B., a trust would arise for B. Even in the eighteenth century, nearly two hundred years, that is, after the Statute of Uses, Chief Baron GILBERT states the general rule that a bargain and sale to A. to the use of B. gives B. a chancery trust with this qualification: "*Quære tamen*, if the consideration moves from A."²

In the light of the preceding authorities, LORD HARDWICKE's oft quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. LORD HARDWICKE himself, some thirty years afterwards, in *Buckinghamshire v. Drury*,³ put the matter much more justly: "As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so)." The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement.

¹ 1 Ch. Cas. 114.

² Gilbert, *Uses*, 162. But in 1700 the limitation of a use upon a use seems to have been one of the regular modes of creating a trust. *Symson v. Turner*, 1 Eq. Cas. Abr. 383. The novelty of the doctrine is indicated, however, by the fact that, even in 1715, in *Daw v. Newborough*, Comyns, 242, the court, after saying that the case was one of a use upon a use, which was not allowed by the rules of law, thought it worth while to add: "But it is now allowed by way of trust in a court of equity."

³ 2 Eden, 65.

LECTURE XXII.

SPECIFIC PERFORMANCE OF CONTRACTS.¹

ENGLISH and American lawyers are so familiar with the jurisdiction of equity in enforcing the specific performance of contracts, that it probably occurs to very few of them that there is anything extraordinary in this remedy of the courts of chancery. The doctrine of specific performance is, however, one of the paradoxes of legal history. Only in the United States and the British Empire, the two countries in which popular government has attained its highest development, is it permitted so far to invade the liberty of the individual as to compel him specifically to perform his contracts upon pain of imprisonment. "*Nemo potest præcise cogi ad factum*," was a rule of the Roman law. In France, Germany, and presumably in the other European States, pecuniary compensation is the sole remedy for a breach of contract.²

Even in England the practice of the chancellors met with strenuous opposition from the common-law judges, and was finally established only at a comparatively late period. Mr. Spence, it is true, has expressed the opinion, to which Lord Justice Fry has added the weight of his authority,³ that "bills for specific performance of contracts for the sale of land are amongst the earliest that are recorded in the court of chancery."⁴ But this opinion would seem to be erroneous. In its support these eminent writers cite a case of the time of Richard II.⁵ (1377-1399). The bill alleged that the plaintiff, trusting in the defendant's promise to convey certain land to him, had paid out money in traveling to London and consulting counsel, and prayed for a *subpæna* to compel the defendant to answer of his "disceit." There is no allusion to specific performance; the bill sounds in tort rather than in contract; and its object was, in all probability, not specific performance but reimbursement for

¹ Reprinted by permission from "Green Bag," vol. i. p. 26.

² Fry, Specific Performance, 2d ed., 3.

³ *Ibid.*, 8.

⁴ 1 Spence, Eq. Jurisp. 645.

⁵ 2 Cal. Ch. II. Two similar cases are reported: 1 Cal. Ch. XLI. and Y. B. 8 Ed. IV. 4, pl. 11. The other authorities cited by Mr. Spence are cases of *uses*.

the expenses incurred. Indeed, this probability becomes almost a certainty when it is remembered that equity at this time gave no relief even against feoffees to uses who refused to convey to their *cestuis que usent*, and that the common law gave no action for damages for the breach of a parol promise.

It is probable that the willingness of equity to give pecuniary relief upon parol promises hastened the development of the action of *assumpsit*. FAIRFAX, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to chancery;¹ and FINEUX, C. J., remarked, in 1505, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpœna* in such cases.²

Brooke, in his "Abridgment," adds to this remark of FINEUX, C. J.: "But note that he shall have only damages by this [action on the case], but by *subpœna* the chancellor may compel him to execute the estate or imprison him *ut dicitur*."³ Brooke died in 1558. This note by him and the following meagre report of a case in 1547⁴ — "It is ordered that the defendant and his wife shall make an absolute assurance for the extinguishment of her right in the lands," if, indeed, this can be said to be in point — seem to be the earliest allusions to the equitable doctrine of specific performance. Against these should be set the statement of DYER, J., in 1557:⁵ "And no *subpœna* will lie for her [the covenantee], as for a *cestui que use*, to compel Sir A. [the covenantor] to execute the estate . . . because she has her remedy at common law, by action of covenant."

In the reign of Elizabeth, however, there are several reported cases in which specific performance of contracts was decreed.⁶

There were many similar decrees in the reign of James I., one of which, according to Tothill, was "by the judge's advice."⁷ This is, possibly, an error of the reporter. At all events, the hostility of the common-law judges to the jurisdiction of equity over contracts was very plainly expressed, two years later, in *Gollen v. Bacon*⁸ by FLEMING, C. J.: "If one doth promise for to give me a horse for 20 shil-

¹ Y. B. 21 Ed. IV. 23, pl. 6.

² Bro. Abr. Act. on Case, pl. 72.

³ Wingfield v. Littleton, Dy. 162 a.

⁴ Y. B. 21 Hen. VII. 41, pl. 66.

⁵ Carington v. Humphrey, Toth. 14.

⁶ Pope v. Mason (1560), Toth. 3; Hungerford v. Hutton (1569), Toth. 62; Foster v. Eltonhead (1582), Toth. 4; Kempe v. Palmer (1594), Toth. 14; King v. Reynolds (1597), Ch. Cas. Ch. 42; Beeston v. Langford (1598), Toth. 14.

⁷ Throckmorton v. Throckmorton (1609), Toth. 4.

⁸ 1 Bulst. 112.

lings, afterwards he doth not perform this; I am not in this case to go and sue in chancery for my remedy, but at the common law, by an action on the case for a breach of promise, and so to recover damages; and this is the proper remedy, and the common law warrants only a remedy at the common law; and if the law be so in the case of a horse, *a multo fortiori* it shall be so in case of a promise to make an assurance of his land upon good consideration, and doth not perform it, he is not to sue in chancery for this, but at the common law, which is most proper." CROKE, J., and YELVERTON, J., agreed herein with the Chief Justice, who added: "There are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at the common law, the same being the most indifferent trial, by a jury of twelve men." As might be supposed, the most determined opponent of this new encroachment of equity upon the common law was LORD COKE. In *Bromage v. Genning*¹ the plaintiff applied to the King's Bench for a prohibition against a suit for specific performance of a lease brought against him in the Marches of Wales, on the ground that Genning's proper remedy was an action at law. Sergeant Harris, in reply, urged that the object of the suit was not the recovery of damages but the execution of the lease, and that this was regularly done in chancery. COKE, C. J., DODDRIDGE and HOUGHTON, JJ.: "Without doubt a court of equity ought not to do so, for then to what purpose is the action on the case and covenant; and COKE said that this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will; and so it is if a man binds himself in an obligation to enfeoff another, he cannot be compelled to make the feoffment."

Sergeant Harris then confessed that he acted in the matter against his conscience, and the court accordingly granted the prohibition. This was in 1616, the year of the memorable contest between LORD COKE and LORD ELLESMERE as to the power of equity to restrain the execution of a common-law judgment obtained by fraud. LORD COKE was alike unsuccessful in this contest, and in his attempt to check the jurisdiction of equity in matters of contract. The right of equity to enforce specific performance, where damages at law would be an inadequate remedy, has never since been questioned.

¹ 1 Rolle, R. 368.

MISCELLANEOUS LEGAL ESSAYS.

PURCHASE FOR VALUE WITHOUT NOTICE.¹

It seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice.²

But, in *Phillips v. Phillips*³ (1861), which at once became, and has since continued to be, the leading authority upon this subject, this doctrine, which Mr. Sugden strenuously defended to the last,⁴ was definitively rejected. LORD WESTBURY, in his opinion, arranged the cases in which the plea of purchase for value would be a bar to equitable relief in three classes: (1) When an application is made to the auxiliary jurisdiction of the court. As illustrations under this class were mentioned bills for discovery and bills for the surrender of title-deeds belonging to the plaintiff. (2) Where one who purchased an equitable interest in property, without notice of a prior equitable incumbrance of the plaintiff, has subsequently got in the outstanding legal title. This was the doctrine of *tabula in naufragio*. (3) When a plaintiff seeks to charge a purchaser with "an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud, or to correct it for mistake." On the other hand, to a bill invoking the concurrent or exclusive jurisdiction of equity against a subsequent equitable incumbrancer, purchase for value without notice would be no defense.

It will be noticed that one common case of protection to a purchaser, namely, where one buys a legal title from a misconducting trustee without notice of the trust, does not come within any of LORD WESTBURY'S three classes. Furthermore, the discrimination in his third class between an equity and an equitable estate

¹ Reprinted by permission from the Harvard Law Review for April, 1887; with manuscript additions by the author.

² *Stanhope v. Verney*, 2 Eden, 81, 85, per LORD HENLEY; *Jerrard v. Saunders*, 2 Ves. Jr. 454, per LORD LOUGHBOROUGH; *Wallwyn v. Lee*, 9 Ves. 24, per LORD ELDON; *Payne v. Compton*, 2 Y. & C. Ex. 457, per LORD ABINGER; *Attorney-General v. Wilkins*, 17 Beav. 285, per SIR JOHN ROMILLY; *Gomm v. Parrott*, 3 C. B. N. S. 47.

³ 4 D., F., & J. 208.

⁴ Sugden, V. & P., 14th ed., 791-798.

is an unfortunate one, for two reasons. In the first place it is an attempted distinction between convertible terms. Every equity attaching to property is an equitable estate. The equity of a defrauded vendor is no less an equitable estate than the interest of *cestui que trust*. Indeed, the fraudulent vendee is constantly called a constructive trustee. Secondly, this distinction has led to a misconception as to LORD WESTBURY'S real opinion. He has been thought to include in his third class all purchasers, even those who have not acquired from the fraudulent vendee the title of the defrauded vendor;¹ and yet it is quite clear that he would have protected those purchasers only who had completed their purchase.²

By far the most satisfactory discussion of this subject is contained in Mr. Langdell's "Summary of Equity Pleading." The conclusions of the learned author coincide in the main, save as to the doctrine of *tabula in naufragio*, with those of LORD WESTBURY. But he has explained, with great clearness, the *rationale* of the doctrine of purchase for value without notice. Mr. Langdell, however, it is hardly necessary to say, was dealing primarily with the subject of equity pleading. His examination of this doctrine as a part of the law of property was incidental and professedly incomplete. Any discrepancies, therefore, that may seem to exist between his views and those of the present writer may be attributed, with possibly one or two exceptions, to an extension of the principles stated in the "Summary," rather than to any real divergence of opinion.

The principle as to purchase for value, which it is the object of these pages to justify, may be concisely stated as follows: A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value with-

¹ 2 White & Tudor, L. C. Eq., 6th ed., 23; Haynes, *Defense of Purchase*, Chap. III. See also *Cave v. Cave*, 15 Ch. D. 639, 647-649, per FRY, J.; *Ernest v. Vivian*, 33 L. J. Ch. 513, 519, per KINDERSLEY, V. C.

² In *Eyre v. Burmester*, 10 H. L. C. 90, M. made a legal mortgage to A., and then, suppressing A.'s mortgage, mortgaged the property to B. B. having subsequently discovered A.'s mortgage, M., by fraudulent representations, induced A. to reconvey to himself. No further conveyance was made to B. In a contest between A. and B., A. prevailed. LORD WESTBURY said, p. 104: "If B. had advanced money to M. on the faith of the release and M.'s actual possession of it, but without taking a conveyance, he might have had a lien on the deed itself; but, this interest being equitable only, would still, in my opinion, have been subject to the superior equity of A." This was said five months after the decision in *Phillips v. Phillips*.

out notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. In all other cases the circumstance of innocent purchase is a fact of no legal significance.

The rule just given is simply an application of that comprehensive principle which lies at the foundation of constructive trusts and other equitable obligations created by operation of law (including implied or *quasi* contracts, which are really equitable liabilities, upon which the common law assumes to give a remedy), namely, that a court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense. Indeed, it is not too much to say that the purchaser of a title from one who holds it subject to an equity is always charged, if chargeable at all, as a constructive trustee. If he acquired the title with notice of another's equity his acquisition was dishonest, and he must, of course, surrender it. If he gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest.¹ If he gave value, and had no notice of the equity, it is eminently just for him to keep what he has got.

It will be convenient to discuss, separately, the three classes of rights, before-mentioned, which a defendant may have acquired, namely: (1) legal rights of property, (2) equitable rights of property, and (3) other common-law rights, and then to consider the cases where the defendant derives no benefit from the circumstance that he is an innocent purchaser; and, finally, to examine the so-called doctrine of *tabula in naufragio*. ✓

I. The typical case of protection of an innocent purchaser is the case where the defendant has bought a legal title from a fraudulent trustee or vendee.² No distinction is to be made between the purchaser of land and the purchaser of a chattel.³ Nor is it

¹ It is sometimes said that a volunteer has constructive notice of prior equities. But this is a perversion of the term notice. If a volunteer should, before actual notice of any equity, dispose of the title by gift, surely no claim could properly be made against him. Yet, if he had constructive notice, he would be liable for a wrong analogous to a breach of trust. If, again, a donee should sell the property, and subsequently buy it back, he could keep the property, though he would have to account for the proceeds of his sale; whereas, if he had constructive notice, he could not keep the property. Ames, *Cas. on Trusts*, 532.

² *Pilcher v. Rawlins*, 7 Ch. 259; Ames, *Cas. on Trusts*, 531, n.

³ *White v. Garden*, 10 C. B. 919; *Kingsford v. Merry*, 11 Ex. 577; *The Horlock*, 2

essential that the innocent purchaser obtain the entire legal interest in the property, either in quantity or duration. The purchaser of an aliquot part of the estate, the grantee for value of a rent charge,¹ or the lessee for value,² may keep the interest actually acquired from the fraudulent legal owner.

Closely akin to a lessee's right is the interest of a pledgee. His right is a legal right *in rem*, and fundamentally different from the lien of an equitable incumbrancer, which is a right *in personam*. The innocent pledgee of a chattel may, therefore, retain his pledge until the claim thereby secured is satisfied.³ A pledge of title-deeds is as effectual as a pledge of any other chattel. Title-deeds are, it is true, so far an accessory of the title to the land as to pass with it to the grantee, although not mentioned in the deed of conveyance.⁴ But they are not inseparably attached to the title. The owner of the land may sever them, if he will, and dispose of them as chattels.⁵ If, therefore, the owner of land, after creating an equitable incumbrance in favor of A., should subsequently give C. an equitable mortgage by a deposit of the title-deeds, A. could not compel the

Pr. D. 243. The fact that a defrauded vendor of a chattel is allowed to maintain trover against the fraudulent vendee has given a certain currency to the opinion that the protection of an innocent purchaser of a chattel is due to the principle of equitable estoppel. See *Moyce v. Newington*, 4 Q. B. 32, 35, per COCKBURN, C. J. *Lindsay v. Cundy*, 3 App. Cas., shows the fallacy of this opinion. In that case, B., fraudulently pretending that he was buying for M., induced A. to consent to the sale to M., and to deliver the goods to himself. B. then sold to C., an innocent purchaser. A. prevailed against C., because the title had never passed from him. And yet there was as strong a basis for estoppel in this case as in those where the fraudulent vendee acquires a defeasible title. See in confirmation of this *Baehr v. Clark*, 83 Ia. 313, 49 N. W. R. 840, where a *bona fide* purchaser from one who by fraud obtained possession, but not title, was not protected. To the same effect, *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. R. 460. In truth, the fraudulent vendee who gets the title is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law.

¹ Y. B. 14 Hen. VIII. 4, pl. 5; Cas. on Trusts, 528, s. c.

² *Wood v. Reigold*, Cro. El. 765, 854; Tolles's App. 22 W. N. (Pa.) 1.

³ *Pease v. Gloahac*, L. R., 1 P. C. 219; *Babcock v. Lawson*, 4 Q. B. D. 394, 5 Q. B. D. 284; *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, 15 Q. B. D. 288; *Higgins v. Lodge*, 68 Md. 229.

⁴ Copinger, Title-Deeds, 2.

⁵ Copinger, Title-Deeds, 4; *Barton v. Gainer*, 3 H. & N. 387, 388. See also the analogous cases of severance, by an obligee, of the document from the obligation. *Chadwick v. Sprite*, Cro. El. 821; *Mallory v. Lane*, Cro. Jac. 342; 2 Roll. Abr. 41 [G. 2]; *Gibson v. Overbury*, 7 M. & W. 555; *Barton v. Gainer*, 3 H. & N. 387; *Rummens v. Hare*, 1 Ex. D. 169.

surrender of the deeds by C., if the latter had no notice of the prior incumbrance.¹ Nor has the Judicature Act affected the rights of such a pledgee.²

An honest purchaser will, furthermore, be protected, although he did not obtain the legal title at the time of his purchase, if he did acquire at that time an irrevocable power of obtaining the legal title upon the performance of some condition, and that too, although, before performance of the condition, he received notice of the prior equitable claim. Thus, if a trustee, in violation of his duty, should sell the trust property to one who had no notice of the trust, and should deliver the deed in escrow, the defrauded *cestui que trust* could not restrain the innocent purchaser from performing the condition, nor could he obtain any relief against him after he had acquired the title.³ On the same principle one who acquired at the time of his purchase an irrevocable power of obtaining the legal title upon the performance of some act by a third party, which that party is in duty bound to perform, will be as fully protected as if he had acquired the title itself at the time of his purchase. *Hume v. Dixon*⁴ is a case in point. The owner of land subject to a vendor's lien sold it to an innocent purchaser; but, under the law of the State, the deed failed to convey the legal title, for the reason that the officer who took the acknowledgment of the deed forgot to sign his name thereto. He subsequently signed the deed, but after the grantee had notice of the lien. The purchaser was protected. Another illustration is furnished by *Dodds v. Hills*.⁵ A trustee of shares in a company wrongfully pledged them, transferred the certificates, and executed a power to the innocent lender to register himself as owner of the shares. The transfer was registered after the lender was informed of the breach of trust. *Wood, V. C.*, refused to deprive the lender of his security. There are similar decisions in Scotland and in this country.⁶

¹ *Joyce v. De Moleyns*, 2 J. & Lat. 374; *Thorpe v. Holdsworth*, 7 Eq. 139. *SIR JOHN ROMILLY's* decision in *Newton v. Newton*, 6 Eq. 135, is, therefore, not to be supported. See further, s. c. on appeal, 4 Ch. 143; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721.

² *Re Morgan*, 18 Ch. Div. 93.

³ *Dodds v. Hills*, 2 H. & M. 424, 427, per *WOOD, V. C.*

⁴ 37 Oh. St. 66. See also *Buck v. Winn*, 11 B. Mon. 320, 323.

⁵ 2 H. & M. 424.

⁶ *Redfearn v. Ferrier*, 1 Dow. 50; *Burns v. Lawrie's Trustees (Scotch)*, 2 D. 1348; *Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 Cal. 112; *Winter v. Belmont*,

If the reasons suggested for protecting the purchaser of shares in a company are sound, they would seem to furnish a solution of the vexed question as to the rights of the innocent purchaser of a chose in action from one who held it subject to what are called latent qualities, *i. e.*, equities in favor of any person other than the obligor; for no solid distinction can be drawn between a transferee of shares, with a power to register himself as owner, and an assignee for value of a chose in action. The so-called assignee is not properly an assignee, *i. e.*, successor, but an attorney with a power to collect or dispose of the claim for his own use. He corresponds to the Roman *procurator in rem suam*. Both in the Roman and the Teutonic systems of law a contract was conceived of as a strictly personal relation. It was as impossible for the obligee to substitute another in his place as it would have been for him to change any other term of the obligation. This conception, rather than the doctrine of maintenance, is the source of the rule that a chose in action is not assignable. In 1 Lilly's Abr., 103, it is said: "A statute merchant, or staple, or bond, etc., cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich., 22 Car. B. R." ¹ It was a consequence of

53 Cal. 428; *Atkinson v. Atkinson*, 8 All. 15; *McNeil v. Tenth Bank*, 46 N. Y. 325. In *Dodds v. Hills*, it will be noticed, the lender was able to complete his title under the power without further assistance from the delinquent trustee. If the lender required the performance of some further act on the part of the trustee in order to complete his title, and if before such performance he received notice of the trust, the loss would fall upon him; for in the case supposed he could not obtain the title without making himself a party to the continuance of the breach of trust. *Ortigosa v. Brown* (47 L. J. Ch. 168) was decided in favor of a defrauded pledgor upon this distinction.

¹ See 2 Spence, Eq. Jur. 850; Pollock, Contracts, 206; 2 Bl. Com. 442. The wrong of maintenance lay in executing and exercising the power of attorney. The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance, while a similar grant to a purchaser or donee was maintenance. 34 Hen. VI. 30-15; 37 Hen. VI. 13-3; 15 Hen. VII. 2-3; *South v. Marsh* (1590), 3 Leon. 234; *Harvey v. Beekman* (1600), Noy, 52. As late as 1667-1672 the same distinction prevailed also in equity. "The Lord Keeper Bridgman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignor owes nothing precedent, so that the assignment is voluntary or for money then given." Freem. C. C. 145. See *Chadwick v. Sprite*, Cro. El. 821. In *Penson v. Hickbed*, Cro. El. 170 (32 El.) an objection was made by counsel that "this buying of bills of debt is maintenance." But the court held otherwise, "for it is usual amongst merchants to make exchange of money for bills of debt, *et c contra*. And

the assignor continuing the legal owner of the obligation that he had the ability, though not the right, to destroy the assignee's right under the power of attorney; he had only to execute a release of the obligation, which would, of course, be a bar to any subsequent action by the assignee, in the assignor's name, against the obligor, even though the latter were a party to the wrong. Such a destruction of the assignee's right would be a tort, and a court of equity would, at the instance of the assignee, either restrain its commission or compel the assignor to surrender to the assignee whatever he had collected of the obligor.¹ This is the real significance of the statements, sometimes made, that a power, though revocable at law, is irrevocable in equity, and that a chose in action is assignable in equity, although not assignable at law.² In the absence of any actual or threatened tort the assignee of a chose in action was entitled to no relief in equity;³ and for the simple reason that he could, by virtue of his power of attorney, enforce payment of his claim at common law. It seems clear, therefore, that, even though the assignor committed a breach of trust in granting to the assignee this power of reducing the chose in action to possession, a court of equity ought not to deprive him of it, if acquired by honest purchase. If this principle is sound in the case of an assignee whose power is only to sue in the name of the assignor, it applies *a fortiori* in favor of an assignee, who, by statute, is permitted to sue in his own name. The authorities are, however, hopelessly irreconcilable. In England the assignee finds no protection, whether the assignor was an express trustee,⁴ or a constructive trustee, *e. g.*,

GAWDY, J. said it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it." See s. c. 4 Leon. 99. In *Barrow v. Gray*, Cro. El. 551 (39 El.) the Court held that "the assignment of a debt or reconusance to a stranger is an illegal and void consideration; but to assign it to the terre-tenant, by way of discharge of his land, is clearly lawful." See *Michael v. Carden*, 1 Vin. Ab. 296, pl. 12; *Loder v. Chesleyn*, 1 Sid. 212, 1 Keb. 744.

¹ — *v. Arrington*, 1 Hayw. (N. C.) 165.

² *Liversidge v. Broadbent*, 4 H. & N. 603, 610, per MARTIN, B.; *Walker v. Roston*, 9 M. & W. 411, 419, per PARKE, B. See Wood, Inst. 282. In *Corderoy's Case*, Freem. 312, FINCH, L. K., said: "Although such a note is not assignable in law, yet it is in equity when there is a valuable consideration."

³ *Cator v. Burke*, 1 Bro. C. C. 434; *Hammond v. Messenger*, 9 Sim. 327; *Hayward v. Anderson*, 106 U. S. 672; *Walker v. Brooks*, 125 Mass. 241.

⁴ *Moore v. Jervis*, 2 Coll. 60; *Brandon v. Brandon*, 7 D., M., & G. 365; *Cory v. Eyre*, 1 D., J., & S. 149; *Re European Bank*, 5 Ch. 358.

a fraudulent assignee.¹ In this country, on the other hand, as also in Scotland,² the assignee is, as a rule, protected from all latent equities³ (except, of course, those in favor of the obligor). The English rule that the assignee takes subject to latent equities is followed in New York;⁴ but a qualification is made in favor of an assignee whose assignor is himself an assignee under a written assignment procured by fraud.⁵ This qualification is supposed to be an illustration of the principle of equitable estoppel. But an estoppel implies a variance between the real and the apparent fact. If, however, an assignment is a power of collection and substitution, it follows that in the case of a fraudulent assignment this essential feature of an estoppel is wanting. There is an identity between the real and the apparent fact. The fraudulent assignee not only purports to have, but actually has, the power of collection and substitution. He is in duty bound, it is true, not to exercise the power to the prejudice of his assignor; but his duty is the same as that which fastens upon the conscience of a fraudulent vendee of land not to convey the land to the detriment of the vendor. The decision in *Moore v. Metropolitan Bank*⁶ is therefore repugnant to the English rule which the courts in New York profess to follow.

In all the cases hitherto considered, the legal title, or other legal right of property, it has been assumed, was acquired at the time of the purchase. But he who advances money on the faith of a legal title that he already has, is equally entitled to protection. Thus, a first mortgagee, who makes subsequent advances in ignorance of a second mortgage, has priority as to those advances over the second mortgagee.⁷ He is in the same position as if he had

¹ *Cockell v. Taylor*, 15 Beav. 103; *Barnard v. Hunter*, 2 Jur. N. S. 1213.

² Bell, *Principles of Law*, 6th ed., 637.

³ *Cas. on Trusts*, 552-553.

⁴ *Schafer v. Reilly*, 50 N. Y. 61; *Trustees v. Wheeler*, 61 N. Y. 88, and other cases cited in *Cas. on Trusts*, 552, n.

⁵ *Moore v. Metropolitan Bank*, 55 N. Y. 41. In *Barry v. Equitable Society*, 59 N. Y. 587, an assignment procured by duress was distinguished, without sufficient reason, from one obtained by fraud.

⁶ 55 N. Y. 41.

⁷ *Collet v. De Gols, Talbot*, 65; *Barnett v. Weston*, 12 Ves. 130; *Hopkinson v. Rolt*, 9 H. L. C. 514 (*semble*); *Truscott v. King*, 2 Seld. 166; *Cas. on Trusts*, 542. The "tacking" in these cases is wholly distinct from that unjust tacking whereby a third mortgagee is permitted to buy up the first mortgage, and "squeeze out" the second.

surrendered his first mortgage and taken a fresh conveyance of the legal estate to secure the whole of his advance. *Newman v. Newman*¹ illustrates the same principle. A *cestui que trust*, who had mortgaged his equity, released his interest to the trustee, who gave value without notice of the mortgage. The trustee, it was decided, could not be charged with the mortgage.

II. It is commonly said that, as between adverse equitable claimants, he who is prior in time is stronger in law, unless by his representation or conduct he has misled the later incumbrancer. But the rule, so stated, requires, at least in point of principle, an important qualification, namely, that the equities of the adverse claimant must be immediate equities against the same person. There are many illustrations of the rule thus modified. For example, B., an express trustee for A., sells, without conveying the legal title, to C., who pays the purchase money without notice of the trust.² Or B. makes an equitable mortgage to C.³ Again, B., a fraudulent vendee, *i. e.*, a constructive trustee, of A., sells, without conveying the legal title, to C.,⁴ or gives him an equitable mortgage, or declares himself a trustee for him. In all these cases A. and C. have each an immediate equity against B. In all of them C. must be postponed, because, in fact, no interest in the land passed to him by B.'s conveyances. B. could not convey A.'s equitable interest as such, although he might have destroyed it by conveying the legal title, and he did not, as he might have done, convey his own legal interest.

But the rule as to conflicting equities, it is conceived, may be expressed more comprehensively. Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity. In all other cases the rule of priority governs, unless modified by the principle of estoppel. As the proposition here advanced has the merit, or, perhaps it

¹ 28 Ch. D. 674.

² *Pinkett v. Wright*, 2 Hare, 120; *Att'y-Gen. v. Flint*, 4 Hare, 147; *Baillie v. M'Kewan*, 35 Beav. 177; *Wigg v. Wigg*, 1 Atk. 384. See also *Cas. on Trusts*, 532-533.

³ *Shropshire Co. v. Queen, L. R.*, 7 H. L. 496; *Cas. on Trusts*, 551, n. 1.

⁴ *Eyre v. Burmester*, 10 H. L. C. 90, 103, per LORD WESTBURY; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464-465, per WALWORTH, C. See also the analogous cases of bills of exchange, *Cas. on Trusts*, 533.

should rather be said, the demerit, of novelty, it will be necessary to examine the true nature of an equitable right of property.

A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical *res*. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and, in the other, a right *in personam*. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting upon all mankind not to destroy the property of another, is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of this duty is as pure a tort in the one case as in the other.¹

The law of transfer is also the same for both forms of property. Take, for instance, the case of land. The owner may diminish his interest (1) by a transfer of the whole or an aliquot part of the land either permanently or for a time; (2) he may grant a rent charge issuing out of the land; or (3) he may charge himself with a trust or other equity in regard to the land. If, after diminishing his interest in either of the first two modes mentioned, he should make an ostensible conveyance of the whole land to an innocent purchaser, the latter would take only the diminished interest of his grantor; whereas, if he should make a similar conveyance after

¹ From the nature of the case such a tort must be of rare occurrence. But instances may be put. B., a *cestui que trust*, assigns his trust to A., and afterwards, before the trustee is informed of the assignment, releases the trust to the trustee, as in *Newman v. Newman*, 28 Ch. D. 674. A.'s right against the trustee is destroyed. Again, suppose that C., a stranger, had maliciously incited B. to make the release. A.'s claim against B. and C. would be for compensation for a purely equitable tort. Compare *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. Div. 333.

reducing his interest, in the third mode, the purchaser would take the legal title unincumbered. No reason occurs to the writer why a *cestui que trust* of land may not deal with his interest in the obligation of the trustee in a similar way, and with similar consequences. He certainly may transfer the whole or an aliquot part¹ of the obligation, and he may grant a rent charge issuing out of it² and he may also charge himself as trustee, or subject himself to any other equity in regard to the obligation. It is also true that if the *cestui que trust*, after diminishing his interest by an assignment, should make an ostensible conveyance of his trust to an innocent purchaser, the latter would take subject to the previous assignment.³ Such a purchaser would also take subject to the annuity or rent charge.⁴ Finally, if the *cestui que trust* should convey his trust after charging himself with a sub-trust, or other equity, the innocent purchaser ought to take the trust discharged from the sub-trust, or other equity, as in the corresponding case the purchaser acquires an absolute title to the land. The analogy between the two cases would seem to be perfect. The *cestui que trust* of the equitable obligation stands in the same relation to the owner of that obligation which the *cestui que trust* of the land occupies towards the owner of the land. Each has an immediate claim against his trustee; neither has a direct claim upon the subject-matter of the trust. Just as the *cestui que trust* of the land must work out his rights through the owner of the land, so the *cestui que trust* of the equitable obligation must work out his rights through the owner of the obligation. As the trustee of the land is complete owner of the land, subject to a duty in favor of the *cestui que trust* of the land, so the trustee of the equitable obligation is complete owner of the obligation, subject to a duty in favor of the *cestui que trust* of the obligation. The conclusion seems unavoidable, therefore, that as the ownership of the land may be transferred

¹ Tierney v. Wood, 19 Beav. 330; Cas. on Trusts, 189. The obligation of a trustee is, from its nature, divisible, differing in this respect from most obligations.

² Phillips v. Phillips, 4 D., F., & J. 208; Cas. on Trusts, 433.

³ Lee v. Howlett, 2 K. & J. 531; Cas. on Trusts, 428, 432, n. 1. An exception is made in the case of the transfer of equitable interests in personalty in England, and in a few States in this country, where the peculiar rule of Dearle v. Hall, 3 Russ. 48, obtains. But this decision, which was virtually a judicial creation of a registry law, has not met with much favor in this country. Putnam v. Story, 132 Mass. 205; Williams v. Ingersoll, 89 N. Y. 508, 523; Cas. on Trusts, 429.

⁴ Phillips v. Phillips, 4 D., F., & J. 208; Cas. on Trusts, 433.

discharged of the duty in the one case, so the ownership of the equitable obligation may be transferred discharged of the duty in the other case. What is true of a sub-trust, or equity, created by the will of the owner of the equitable obligation, must, obviously, be equally true of a sub-trust, or equity, created by operation of law. For example, if the owner of the equitable obligation were induced by fraud or duress to convey the obligation the fraudulent vendee would become the owner of it; but the law would raise a duty in him to deal with it for the benefit of the defrauded vendor, in other words, would make him a constructive trustee of the obligation in favor of the vendor; but if he should convey the obligation to a purchaser for value, without notice of the constructive trust, the purchaser could not properly be charged with it.

None of the decisions, it must be conceded, have proceeded upon the principle herein advanced. Several of them, however, must be supported upon this principle, or else be pronounced erroneous. In *Sturge v. Starr*,¹ A., a *cestui que trust*, was induced by the fraud of B. to sell her trust to C., a purchaser for value, without notice of the fraud. C. was protected in his purchase. In *Lane v. Jackson*,² B., the owner of an equity of redemption, subject to an equity in favor of A., sold the equity of redemption to C., an innocent purchaser. A. was not permitted to enforce his equity against C. *Penny v. Watts*³ was a similar case, with a similar decision. To overrule these cases would be a misfortune.⁴

On the other hand, in *Re Vernon*,⁵ B., who held an equity of redemption in trust for A., sold it to C. The decision was in A.'s favor, on the ground of priority in time. In the court below, however, BACON, V. C., found that C. had notice of the trust, and the Court of Appeal disclaimed any dissent from this finding. In *Cave v. Mackenzie*,⁶ an agent, acting for an undisclosed principal, contracted in his own name for the purchase of an estate, and then sold his right to call for a conveyance. The purchaser was deprived of the benefit of his purchase. In *Daubeney v. Cockburn*,⁷ B., having a power to appoint a trust-fund to any of his children, which

¹ 2 M. & K. 195.

² 20 Beav. 535.

³ 2 DeG. & Sm. 501.

⁴ *Bailey v. Barnes* [1894] 1 Ch. 25, is also right on this principle, but it was unfortunately decided on the obnoxious principle of tacking.

⁵ 33 Ch. Div. 402; 32 Ch. Div. 165.

⁶ 46 L. J. Ch. 564.

⁷ 1 Mer. 626.

fund, in default of appointment, was to go to A., appointed the fund fraudulently to his daughter, M., in order to secure a personal advantage. M. transferred the fund to C., an innocent purchaser. C. was not permitted to keep the fund.¹ Decisions like these, it is submitted, are powerful arguments against the doctrine of which they are a necessary consequence.

III. There were formerly two classes of cases in which a purchaser who had not acquired a right of property, either legal or equitable, was, nevertheless, allowed to plead purchase for value as a bar to the jurisdiction of a court of equity, on the ground that the plaintiff was seeking to deprive him of a common-law right, acquired as an incident of his purchase. One of these rights was the right of a defendant to refuse to testify in a court of common law. Bills for discovery against a purchaser for value were invariably dismissed, equity declining to strip the defendant of his common-law advantage.² A defendant had no right, on the other hand, to refuse to give evidence to be used in a court of equity. Accordingly, if a defendant failed to demur or plead to a bill for relief, but answered, he was bound to answer fully, although he were a purchaser for value without notice.³

The other right, of which a purchaser for value without notice could not be deprived, was the right to set up an outstanding satisfied term as a bar to an action of ejectment. It was not inequitable for him to insist upon an advantage which the policy of the law gave him, and accordingly purchase for value was a sufficient ground for dismissing a bill to restrain the defendant from setting up the term.⁴ Both of these rights were accidental, and, with the change of the policy of the law, have ceased to exist, a defendant having been obliged to testify at law since 1851, and

¹ *Vernon v. Yalden*, (1722), *May, Fr. Couvey*, (2d ed.) 574; *Carritt v. Real Co.*, 42 Ch. D. 263; *Shoufe v. Griffiths*, 4 Wash. 161, 30 Pac. R. 93.

² *Bassett v. Nosworthy*, *Finch*, 102; *Hoare v. Parker*, 1 Bro. C. C. 578; *Gomm v. Parrott*, 3 C. B. N. S. 47.

³ *Lancaster v. Evors*, 1 *Phillips*, 349, 352; *Emmerson v. Ind.*, 33 Ch. Div. 323, 331; *Langdell, Eq. Pl.*, 2d ed., § 194.

⁴ *Goleborn v. Alcock*, 2 *Sim.* 552; *Langdell, Eq. Pl.*, 2d ed., § 189. Mr. Langdell makes it clear that a bill to restrain the setting up of an outstanding term is not a bill belonging to the auxiliary jurisdiction. But, if the general principle of this essay is sound, the success of the defendant does not depend upon the nature of the jurisdiction invoked, but upon the possession of a right which the plaintiff seeks to take from him.

satisfied terms having been virtually abolished by the Satisfied Terms Act.

IV. Except in the cases mentioned in the preceding three sections a defendant can derive no advantage from the circumstance that he is a purchaser for value without notice. This will appear by an enumeration of the different classes of bills which have been sustained against such a purchaser. Bills of foreclosure, whether by a legal¹ or equitable² mortgagee; bills for partition;³ for an account of tithes;⁴ for the assignment of dower;⁵ for the surrender of possession of chattels;⁶ to have a paid judgment satisfied of record;⁷ for the removal of a cloud upon a title;⁸ for the cancellation of a void instrument;⁹ for the perpetuation of testimony.¹⁰ In none of the cases just mentioned was a court of equity called upon to deprive the defendant of any right of property. In all of them the right of property was in the plaintiff, who asked only for that assistance which equity regularly gives to owners of property.

In *Attorney-General v. Wilkins*¹¹ a plea of purchase for value was allowed to defeat a bill for the recovery of a rent. But this case would, doubtless, not be followed. An exception existed in the case of a bill by the legal owner of an estate for the surrender of the title-deeds. *Wallwyn v. Lee*.¹² This case was decided under the influence of the old view that equity would give no assistance against an innocent purchaser. And it would certainly have been a case of great hardship to the defendant if the decision had been adverse to him. For, it is highly probable, the plaintiff resorted to equity from inability to prove his title at law, and if he had succeeded

¹ *Finch v. Shaw*, 5 H. L. C. 905.

² *Frazer v. Jones*, 5 Hare, 475, 17 L. J. Ch. 353.

³ *Snellgrove v. Snellgrove*, 4 Dess. 274; *Donald v. McCord*, Rice Eq. 330. But see *contra*, *Lyne v. Lyne*, 21 Beav. 318.

⁴ *Collins v. Archer*, 1 Russ. & My. 284.

⁵ *Williams v. Lambe*, 3 Bro. C. C. 264; *McMorris v. Webb*, 17 S. C. 558.

⁶ *Jones v. Zollicoffer*, 2 Tayl. 212; *Brown v. Wood*, 6 Rich. Eq. 155.

⁷ *Traphagen v. Lyon*, 38 N. J. Eq. 613.

⁸ *U. S. v. Southern Co.*, 18 Fed. Rep. 273; *Gray v. Jones*, 14 Fed. Rep. 83.

⁹ *Esdale v. Lanauze*, 1 Y. & C. Ex. 394; *Vorley v. Cooke*, 1 Giff. 230; *Peabody v. Fenton*, 3 Barb. Ch. 451 (*semble*).

¹⁰ *Dursley v. Berkeley*, 6 Ves. 251, 263-264, *semble per LORD ELDON*. But see *contra*, *Jerrard v. Saunders*, 2 Ves. Jr. 454, 458, *per LORD LOUGHBOROUGH*.

¹¹ 17 Beav. 285.

¹² 9 Ves. 24.

he would, by an indirection, have got the evidence which he could not have obtained by a bill for discovery. The refusal of the court in several cases¹ to compel the surrender of title-deeds in foreclosure suits brought by a legal mortgagee after the plaintiff had proved his title is cause for surprise. But these cases have now lost their force, since, under the Judicature Act, the plaintiff gets in the foreclosure suit what formerly he would obtain only by a separate action at law.²

V. In cases where the rule of priority in time would otherwise determine the rights of adverse equitable claimants, it sometimes happens that the later incumbrancer subsequently acquires the outstanding legal title. Under what circumstance can he profit by the title so obtained? By the old law, if he gave value for his equity without notice of the prior equity, he was permitted to use the subsequently acquired title as *tabula in naufragio* under all circumstances, even though he gave nothing for the legal title, or obtained it with notice of the prior equity. This was an extreme application of the old rule, that equity would not exercise its jurisdiction against an honest purchaser. It was, however, long since decided that a later incumbrancer could derive no advantage from an outstanding satisfied term got in with notice of the prior equity.³ No case has been found where such a term was got in without notice of the prior equity. SIR GEORGE JESSEL, M.R., put the case, however, in *Mumford v. Stohwasser*,⁴ and expressed a strong opinion that the later equitable claimant could not use the term as *tabula in naufragio*, because, having acquired it as a volunteer, he could not honestly retain it.

The common illustration of the ancient rule is the English doctrine of tacking, whereby a third mortgagee, who advanced his money in ignorance of a second mortgage, is permitted upon discovering its existence to buy up the first mortgage, to tack his

¹ *Head v. Egerton*, 3 P. Wms. 280; *Kendall v. Hulls*, 11 Jur. 864; *Hunt v. Elmes*, 2 D., F., & J. 578; *Heath v. Crealock*, 10 Ch. 22; *Waldy v. Gray*, 20 Eq. 238.

² *Cooper v. Vesey*, 20 Ch. Div. 611; *Manners v. Mew*, 29 Ch. Div. 725; *In re Ingham*, [1893] 1 Ch. 352.

³ *Allen v. Knight*, 5 Hare, 272, 11 Jur. 257; *Carter v. Carter*, 3 K. & J. 717; *Prosser v. Rice*, 28 Beav. 68, 74; *Sharples v. Adams*, 32 Beav. 213, 216; *Baillie v. McKewan*, 35 Beav. 177; *Pilcher v. Rawlins*, 7 Ch. 259, 268; *Mumford v. Stohwasser*, 18 Eq. 556; *Cas. on Trusts*, 534, n. 2.

⁴ 18 Eq. 562. The same idea is expressed by the same judge in *Maxfield v. Burton*, 17 Eq. 15, 19, and by NORTH, J., in *Garnham v. Skipper*, 55 L. J. Ch. 263, 264.

own to it, and so "squeeze out" the second.¹ This doctrine has found no support in this country,² and has been the subject of much adverse criticism in England.³ Even if a third mortgagee should buy up the first mortgage, being still in ignorance of the second, he would not, upon principle, be entitled to priority over the second mortgagee.⁴ For, as he gave his money solely for the first mortgage, if he should be allowed to get anything more than that, he would get it for nothing, and could not, therefore, honestly keep it at the expense of the second mortgagee.

It is possible, however, for a later equitable claimant, who has already paid his money, to obtain the legal title afterwards for value; and if he so obtains it, being still ignorant of the prior equity, he is as much entitled to protection as any other purchaser of a legal title. For example, if a trustee should, in violation of his trust, contract to sell the land to A., receiving the purchase money at the time, or should make an equitable mortgage by deposit of the title-deeds, and should afterwards, in discharge of his obligation, convey the legal title to A., the latter could not be charged with the prior equity;⁵ for one who takes a legal title in discharge

¹ *Marsh v. Lee*, 1 Ch. Ca. 162; *Bates v. Johnson*, Johns. 304; *Cas. on Trusts*, 537, 541, n. 1.

² 1 Story, Eq. Jur., 12th ed., §§ 413-419; 4 Kent, 13th ed., 177-179; *Cas. on Trusts*, 542.

³ *Bruce v. Duchess of Marlborough*, 2 P. Wms. 491; *Jennings v. Jordan*, 6 App. Cas. 698, 714; *West London Bank v. Reliance Society*, 29 Ch. Div. 954, 961, 963. Under certain circumstances one who advances money upon the security of property, upon which two mortgages have already been given, is justly entitled to outrank the second mortgagee. For example, M. has made a first mortgage for \$5,000 to A., and a second mortgage for \$5,000 to B. A. desiring his money, M. proposes to C. that he shall advance \$10,000, paying \$5,000 to A., and taking a conveyance from him, and paying the other \$5,000 to M. If C. makes the advance of \$10,000 in the manner suggested, and has no notice of B.'s mortgage, he may fairly claim priority over B. *Peacock v. Burt*, 4 L. J. Ch. N. S. 33, was such a case. This is not a case of tacking, nor of *tabula in naufragio*. The transaction is the same in substance as if A. had reconveyed to M., and M. had then made a legal mortgage for \$10,000 to C. *Carlisle Co. v. Thompson*, 28 Ch. D. 398, was similar to *Peacock v. Burt*, except that C. was not a mortgagee, but a purchaser.

⁴ But see *infra*, p. 283.

⁵ *Ratcliffe v. Barnard*, 6 Ch. 652; *Cooke v. Wilton*, 29 Beav. 100; *Leak v. Scott*, 2 Q. B. Div. 376; *Osgood v. Thompson Bank*, 30 Conn. 27; *Gibson v. Lenhart*, 101 Pa. 522. But see *contra*, *Barnard v. Campbell*, 55 N. Y. 466, 58 N. Y. 73. But by the law of New York one who takes a title in payment of a debt is not considered to be a purchaser for value. *Dickerson v. Tillinghast*, 4 Paige, 215; *Stevenson v. Brennan*, 79 N. Y. 254.

of a claim against the transferrer is a purchaser for value.¹ It follows, therefore, that these cases do not come within the doctrine of *tabula in naufragio*, and it may be fairly said that that doctrine survives only in the unjust and much-criticised English rule of tacking.

In conclusion, the results of the preceding pages may be summed up as follows: The purchaser of any right, in its nature transmissible, whether a right *in rem* or a right *in personam*, acquires the right free from all equities of which he had no notice at the time of its acquisition. This proposition, it is hoped, will find favor with the reader in point of legal principle. It can hardly fail to commend itself on the score of justice and mercantile convenience.

¹ Taylor v. Blacklock, 32 Ch. D. 560; Merchant's Co. v. Abbott, 131 Mass. 397.

THE DOCTRINE OF PRICE v. NEAL.¹

THE plaintiff in this prominent case² was the drawee of a bill of exchange; the defendant was an indorsee for value in due course. The bill was paid on presentment, the drawee and holder being alike ignorant that the signature of the ostensible drawer was forged. Upon discovery of the forgery the plaintiff sought to recover the money on the ground that it had been paid under a mistake. But the Court of King's Bench gave judgment for the defendant, LORD MANSFIELD delivering the opinion.

The rule established by *Price v. Neal*, that a drawee pays (or accepts) at his peril a bill on which the drawer's signature is forged, has been repeatedly recognized both in England and the United States.³

¹ Reprinted by permission from the Harvard Law Review for February, 1891, with manuscript additions by the author.

² 3 Burr. 1354; 1 W. Bl. 390, s. c. This case, as well as most of those discussed in this paper, will be found in Professor Keener's valuable collection of *Cases on Quasi-Contracts*.

³ *Smith v. Mercer*, 6 Taunt. 76; *Cocks v. Masterman*, 9 B. & C. 902; *Hoffman v. Milwaukee Bank*, 12 Wall. 181; *Young v. Lehman*, 63 Ala. 519, 523; *First Bank v. Ricker*, 71 Ill. 439, 441; *Nat. Bank v. Tappan*, 6 Kan. 456; *Comm. Bank v. First Bank*, 30 Md. 11; *Hardy v. Chesapeake Bank*, 51 Md. 562, 585; *Nat. Bank v. Bangs*, 106 Mass. 441, 444; *Danvers Bank v. Salem Bank*, 151 Mass. 280, 282; *Bernheimer v. Marshall*, 2 Minn. 78; *Stout v. Benoist*, 39 Mo. 277, 299; *Ins. Co. v. Bank*, 60 N. H. 442, 446; *Weisser v. Dennison*, 10 N. Y. 68, 75; *Park Bank v. Ninth Bank*, 46 N. Y. 77; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *Hagen v. Bowery Bank*, 64 Barb. 197; *Nat. Bank v. Grocers' Bank*, 2 Daly, 289; *Ellis v. Ohio Co.*, 4 Oh. St. 628, 652; *Levy v. U. S. Bank*, 1 Binn. 36; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *City Bank v. Nat. Bank*, 45 Tex. 203, 218; *Rouvant v. San Antonio Bank*, 63 Tex. 610; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141; *Johnson v. Bank*, 27 W. Va. 343, 348, 359; *Ryan v. Bank*, 12 Ont. R. 39.

The ill-considered case, *McKleroy v. Southern Bank*, 14 La. An. 458, is a solitary decision to the contrary effect. But this case, though not cited, is virtually overruled by *Howard v. Mississippi Bank*, 28 La. An. 727. See also *Ford v. Peoples Bank*, 74 S. C. 180. By statute, in Pennsylvania, the holder must refund to the drawee in cases like *Price v. Neal*. *Corn Bank v. Bank of Republic*, 78 Pa. 233; but see *Iron City Bank v. Ft. Pitt Bank*, 159 Pa. 46, limiting the scope of the statute. In *Godard v. Merchants' Bank*, 4 N. Y. 147, a payor for honor was allowed to recover the money paid to the holder, on the ground that he paid without first inspecting the bill. Two judges dissented, and their views were followed in *Bernheimer v. Marshall*, 2

The same rule prevails in Scotland¹ and on the continent of Europe.² Unfortunately, there is not a similar unanimity as to the reason of the rule. The drawee's inability to recover the money paid is often referred to his supposed negligence. He ought, it is said, to know the signature of the drawer. Against this view two sufficient objections may be urged. In the first place, negligence on the part of the payor is not, in general, a bar to the recovery of money paid under a mistake.³ If, for instance, a creditor receives payment of a debt, which has already been paid, although he may have received the money in good faith, and the debtor may have paid in careless forgetfulness of the prior payment, it is obviously unjust for the creditor to retain the second payment, and thereby enrich himself at the expense of the debtor. Accordingly the creditor is obliged to refund. Secondly, if the drawee's negligence were the test, he ought to be allowed to show, in a given case, that he was not negligent; for example, that the forgery was so skilfully executed as naturally to deceive him. But such evidence would not be received. "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free from blame and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril."⁴

Another so-called explanation of the rule, that the drawee pays a forged bill at his peril, has obtained great currency; namely, that the drawee is "conclusively presumed to know," or is "estopped to deny," the signature of the drawer. These expressions are repeated by text-writer and judge, apparently without a suspicion of their worthlessness as an explanation of the rule in question. Yet to one asking why the drawee pays at his peril, it is no sufficient answer to say, that the drawee is conclusively presumed to

Minn. 78; *Johnston v. Bank*, 27 W. Va. 343 (see also *Leather v. Simpson*, 11 Eq. 398, 403). In *Wilkinson v. Johnston*, 3 B. & C. 428, a payor for honor was allowed to recover, his position being thought distinguishable from that of a drawee. Such a distinction seems ill-founded in reason, is opposed to the continental law, and was disclaimed in *Goddard v. Merchants' Bank*, *supra*. The case is, at least, of doubtful authority. Chalmers, *Bills of Exch.*, 3d ed., 196.

¹ *Clydesdale Bank v. Royal Bank* (Court of Sess., March 11, 1876).

² 2 Pardessus, *Cours de Droit Commercial*, 3d ed., 501, § 448; Wächter, *Wechselrecht*, 482.

³ *Kelly v. Solari*, 9 M. & W. 54; *Appleton Bank v. McGilvray*, 4 Gray, 518.

⁴ Per ALVEY, J., in *Hardy v. Chesapeake Bank*, 51 Md. 562, 585.

know the drawer's signature. A conclusive presumption of the drawee's knowledge means simply that his ignorance, whether culpable or excusable, is an irrelevant fact. The question, therefore, immediately recurs: Why is the drawee's excusable ignorance an irrelevant fact?¹

The holder's right to retain the money paid him by the drawee has sometimes been placed upon the ground, that, in consequence of the payment, he has lost the right of recourse against prior indorsers, which he would have had, in case the bill had been dishonored. There seems to be great force in this argument. But, if the holder's right of retention were founded solely upon this argument, it would follow that in cases where there were no prior indorsers, he would have to refund the money to the drawee. But the decisions show that the drawee pays at his peril in these cases also.² The holder's right to retain the money must depend, therefore, upon a more comprehensive principle than that of the loss of rights against prior indorsers.

The true principle, it is submitted, upon which cases like *Price v. Neal* are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of *assumpsit* for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage. The same reasoning applies if the drawee has merely accepted the bill. The legal title to the acceptance is in the holder. A court of equity ought not to restrain the holder by injunction from enforcing his legal right, nor should a court of law permit the acceptor to defeat his acceptance by an equitable defense.

¹ If there were in truth any such conclusive presumption of the drawee's knowledge, a drawee who *purchased* instead of paying a forged bill ought not to recover his purchase-money; but a recovery is allowed. *Fuller v. Smith*, 1 C. & P. 197; *Ry. & M.* 49, S. C.

² *Howard v. Mississippi Bank*, 28 La. An. 727; *Commercial Bank v. First Bank*, 30 Md. 11; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *Levy v. U. S. Bank*, 1 Binn. 27; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141; *Johnston v. Bank*, 27 W. Va. 343.

LORD MANSFIELD, in *Price v. Neal*, considered, it is true, the question of the drawee's negligence, but it is evident, from the following extracts, that he based his opinion chiefly upon the principle just stated: —

"It is an action upon the case for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money unless it be *against conscience* in the defendant to retain it. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange, indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery. . . . If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man."¹

If, indeed, the equities are not equal, — if, for instance, the holder acquired the bill, not in the course of business, but as a gift, — he ought not to be permitted to retain the money paid him by the drawee. That would not be a case where one of two innocent persons must suffer a loss in any event. If the money is repaid, neither will suffer a loss. For the holder, although he refund, is not really out of pocket. By refusing to repay, he would be striving unconscientiously to enrich himself by a positive increase of his property at the expense of the drawee.

Again, the equities might be unequal because of the holder's misconduct. He might have purchased the bill from a stranger, making no inquiries as to his identity or character. Inasmuch as such inquiries would ordinarily disclose the fraud, if any, and prevent its success, the holder, who thus carelessly fails to satisfy himself as to the identity and honesty of his transferrer, may fairly be held responsible for the consequent loss, which must fall either on the drawee or himself. The general principle and this limitation are forcibly stated by RANNEY, J.: —

"We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery when some one must suffer by the

¹ The same principle is stated in *Commercial Bank v. First Bank*, 30 Md. 11, 22; *Gloucester Bank v. Salem Bank*, 17 Mass. 42; *Bernheimer v. Marshall*, 2 Minn. 78, 83.

mistake. But we must be better informed than at present, before we shall be able to perceive the justice or propriety of permitting a holder to profit by a mistake which his own negligent disregard of duty has contributed to induce the drawee to commit."¹

So, also, a holder who acquired the bill in good faith and with due care, but afterwards discovered or suspected the forgery, could not honestly collect an unaccepted bill, or procure an acceptance; and if he should collect it, would be bound to refund the money.²

The generally received rule, that the drawee pays or accepts a forged bill at his peril, has nevertheless been assailed by the distinguished author of a very successful book. Mr. Daniel, in his treatise on Negotiable Paper,³ maintains that a drawee, who pays or accepts a forged bill, should be permitted to recover the money paid or to resist his acceptance, for the reason that the holder, who presents a bill to the drawee for payment or acceptance, "represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment, as such. If he indorses it, he warrants its genuineness; and his own assertion of ownership is a warranty of genuineness in itself." But, with all deference, this criticism, and the similar criticism of Mr. Justice CHAMBRE, in his dissenting opinion in *Smith v. Mercer*,⁴ spring from a false analogy. One who transfers a bill or any chattel, whether by way of sale or in payment of a debt, does indeed represent that the thing sold or exchanged is his, and also what it purports to be. To use the common expression, he impliedly warrants his title and the genuineness of the thing transferred. Accordingly, if it is not genuine, the vendee may recover his pur-

¹ *Ellis v. Ohio Co.*, 4 Oh. St. 628, 668. See to the same effect *Nat. Bank v. Bangs*, 106 Mass. 441; *Danvers Bank v. Salem Bank*, 151 Mass. 280; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rouvant v. San Antonio Bank*, 63 Tex. 610. The French law is the same. ² *Pardessus, Cours de Droit Commercial*, 3d ed., § 505; ² *Bédarride, Lettre de Change*, 2d ed., § 377.

But see *contra*, *Howard v. Mississippi Bank*, 28 La. An. 727; *Comm. Bank v. First Bank*, 30 Md. 11; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *St. Albans Bank v. Farmers' Bank*, 10 Vt. 141. It would not be surprising if these last four cases should not be followed even in the jurisdictions in which they were decided.

³ *First Bank v. Ricker*, 71 Ill. 439; *Nat. Bank v. Bangs*, 106 Mass. 441, 444-445. For like decisions in analogous cases see *Martin v. Morgan*, 3 Moore, 635; *City Bank v. Burns*, 68 Ala. 267 (*semble*); *Peterson v. Union Bank*, 52 Pa. 206. See also *Whistler v. Foster*, 14 C. B., N. S. 340.

⁴ Vol. II., 3d ed., § 1361.

⁶ 6 Taunt. 76.

chase-money, or the creditor may treat his debt as still unpaid.¹ But the attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainer. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect, says: "Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment." Mr. Justice CHAMBRE's statement, that the holder warrants the genuineness of the bill by presenting it, was expressly repudiated by LITTLEDALE and BAYLEY, JJ., in *E. I. Co. v. Tritton*.² The notion, that the holder's indorsement of his name on the bill at the time of payment is a warranty of the genuineness of the bill, although not without judicial sanction,³ should be strenuously resisted. The so-called indorsement is not an indorsement at all, but simply a receipt of payment.⁴

Wherever *Price v. Neal* is recognized as law, we should expect to find that one who paid a bill or note on which his own name was forged could not recover the money from an innocent holder for value. The authorities, with a single exception, permit the holder to retain the money.⁵

¹ *Jones v. Ryde*, 5 Taunt. 488; *Young v. Cole*, 3 Bing. N. C. 724; *Gurney v. Womersley*, 4 E. & B. 133; 2 Ames, Cas. B. & N. 242, n. 1, 633, n. 1.

² 3 B. & C. 289, 290-291. See to the same effect *Wilkinson v. Johnston*, 3 B. & C. 428, 436; *Bernheimer v. Marshall*, 2 Minn. 78, 84; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141, 146-147. The distinction between a sale and a payment of a bill is pointedly taken in *Corn Bank v. Nassau*, 91 N. Y. 74, 80.

³ *Nat. Bank v. Bangs*, 106 Mass. 441; *People's Bank v. Franklin Bank*, 88 Tenn. 299.

⁴ See Story, *Prom. Notes*, 7th ed., 526, n. 5; *Dedham Bank v. Everett Bank*, 177 Mass. 392; *Northwestern Bank v. Bank of Commerce*, 107 Mo. 402. A confirmation of the view stated in the text is found in an anonymous "Essay on Bills of Exchange" (1769), p. 10, where a receipt in full by the holder appears on the back of the bill. In time this filling out of the receipt was abandoned, being understood.

⁵ *Mather v. Maidstone*, 18 C. B. 273; *Young v. Lehman*, 63 Ala. 519, 523; *Tyler v. Bailey*, 71 Ill. 34, 37; *Allen v. Sharpe*, 37 Ind. 67, 73; *Third Bank v. Allen*, 59 Mo. 310, 315; *Lewis v. White's Bank*, 27 Hun. 396; *Johnston v. Bank*, 27 W. Va. 343; *Banca Nazionale v. Giacobini*, Cassaz. di Torino (1871), cited in *Famone*, *Il Codice Civile*, 454-455; 2 Pardessus, *Cours de Dr. Comm.*, 3d ed., 505 § 449; 2 Bédarride, *Lettre de Change*, 2d ed., § 380. See also *Bank of U. S. v. Bank of Ga.*, 10 Wheat. 333; *Cook v. U. S.*, 91 U. S. 389, 396-397; *Gloucester Bank v. Salem Bank*, 17 Mass. 33. The exceptional case *contra*, *Welch v. Goodwin*, 123 Mass. 71, is not to be supported. It was decided almost wholly upon the authority of *Carpenter v. Northborough Bank*, 123 Mass. 66, which was a totally different case. In this last case, the plaintiff made

In order to test the soundness of the principle upon which LORD MANSFIELD proceeded in *Price v. Neal*, it will be well to consider some analogous cases clearly within his principle, but to which the reasons commonly assigned for the decision in that case are inapplicable.

The case of *Leather v. Simpson*¹ is especially valuable for our present purpose. The defendant had discounted for the drawer certain bills of exchange, to which bills of lading were attached. The plaintiff, the drawee of the bills of exchange, paid them to the defendant on the faith of the bills of lading. The bills of lading turned out to be forged. The plaintiffs then sought to recover the money as money paid by mistake, but failed. There was, confessedly, no actual negligence in the case. No one will assert that the drawer was conclusively presumed to know the captain's signature to the bills of lading. The defendant gave up no rights against prior indorsers, for there were none. The gist of the opinion of MALINS, V. C., is thus stated by him: —

"The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be returned."

The Vice-Chancellor in this case, and LORD DENMAN in the similar case of *Robinson v. Reynolds*,² where the drawee was compelled to pay his acceptance, repudiated the drawee's claim that the holder, by presenting the bills of exchange with the bills of lading attached, warranted the genuineness of the latter.³ The decisions in this country accord with *Leather v. Simpson* and *Robinson v. Reynolds*.⁴

a note payable to A., and gave it to B. for the latter's accommodation, upon the understanding that A. should also indorse for B.'s accommodation. B. forged A.'s name as indorser and discounted the note with the defendant, to whom the plaintiff paid it when due. The title of the note obviously never passed from the plaintiff. The defendant, therefore, obtaining the money by the wrongful use of the plaintiff's property, must hold the money as a constructive trustee for the plaintiff, who accordingly rightly recovered it from the defendant. *Talbot v. Rochester Bank*, 1 Hill, 295; *Arnold v. Cheque Bank*, 1 C. P. D. 578, were similar cases.

¹ 11 Eq. 398.

² 2 Q. B. 196.

³ *Baxter v. Chapman*, 29 L. T. Rep. 642; *Goetz v. Bank*, 119 U. S. 551, *accord*.

⁴ *Goetz v. Bank*, 119 U. S. 551; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *Young v. Lehman*, 63 Ala. 519; *First Bank v. Burnham*, 32 Mich. 323; *Craig v.*

The principle that, when a loss must fall upon one of two innocent parties having equal equities, the one who has the legal title will prevail, is conspicuously illustrated by another class of cases strongly resembling the one just considered. *Aiken v. Short*,¹ *Heurtematte v. Morris*,² *Fort Dearborn Bank v. Carter*,³ *Southwick v. First Bank*,⁴ and the like, decide, that the payee of an order or bill of exchange, who takes the same either by way of purchase or on account of a debt due to him from the drawer, and who afterwards procures its acceptance or payment by the drawee, may enforce the acceptance or keep the money, although the drawee was induced to accept or pay by the fraudulent representations of the drawer. This doctrine is a familiar one in the continental law.⁵ Duranton first considers the case where the payee was a creditor of the drawer, and remarks that the "Roman law not only denied the drawee's right to recall what he had paid on his acceptance, although induced by mistake, but also allowed him no defense to an action upon his promise, and that, too, although he accepted in consequence of the fraud and chicanery of the drawer." He then points out that if the payee were a volunteer he could not keep the money or enforce the promise, because in such a case "the payee is not fighting to avoid a loss, but rather to make a profit, and the drawee, on the other hand, is fighting to avoid a loss. . . . Whereas, when the payee is a creditor of the drawer, *versaretur in damno*, if the drawee could refuse to perform his promise or could recall his payment."

In like manner the assignee of a chose in action, who acquires it by purchase or on account of a debt due him from the obligee, and who collects the claim from the obligor, may keep what he

Sibbett, 15 Pa. 240; *Randolph v. Merchants' Bank*, 7 Baxt. 456. In the Michigan case, COOLEY, J., said: "The best view that can be taken of this case for the plaintiff below is, that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually when one of two parties, equally innocent, must suffer, the law leaves the loss where it has chanced to fall."

¹ 1 H. & N. 210; *Walker v. Conant*, 69 Mich. 321, *accord*.

² 101 N. Y. 63.

³ 152 Mass. 34, 25 N. E. Rep. 27. See *acc.* *Iselin v. Chemical Bank*, 6 N. Y. App. Div. 532.

⁴ 84 N. Y. 420.

⁵ 12 Duranton, *Cours de Droit Français*, § 332; Gide, *Novation*, 421; Erxleben, *Conditiones sine Causa*, 156 *et seq.*; 3 Endemann, *Handbuch d. Handels-, See- und Wechselrechts*, 1102, 1115.

has got, although the obligor paid in ignorance of the fact that he had a valid defense to the enforcement of the claim; *e. g.*, fraud,¹ illegality,² failure of consideration,³ payment,⁴ set-off,⁵ and the like. The case of *Merchants' Co. v. Abbott* is a typical one. Certain buildings, insured in the plaintiff company, were set on fire by the owner and destroyed. The owner then assigned the policy of insurance to the defendant, to whom the plaintiff paid the amount of the adjusted loss, both parties being ignorant of the owner's fraud. The defendant was allowed to keep the money. In *Mar v. Callander*, a creditor, who had been paid by the debtor's chamberlain, assigned his debt to the defendant; a new chamberlain, who was ignorant of the payment by his predecessor, paid the debt to the defendant. Here, too, the defendant prevailed.

Consistently with the cases hitherto considered, if a drawee pays a bill of exchange, erroneously supposing that the amount to the credit of the drawer is sufficient to meet the bill, he ought not, upon discovering his mistake, to recover the money paid from the holder. Such is the law in England and several of our States.⁶ In *Chambers v. Miller*, the mistake was discovered while the holder

¹ *Merchants' Co. v. Abbott*, 131 Mass. 397. A. by fraud got a certificate of purchase from the state, and sold it to defendant, a *bona fide* purchaser, who then obtained a patent from the state: *People v. Swift*, 96 Cal. 165. A. by fraud got a stock certificate from a corporation and transferred it to a *bona fide* purchaser, who surrendered it to the company for a new one running to himself; the company has no defence: *Tecumseh Bank v. Russell*, 50 Neb. 277, 69 N. W. R. 763. A mortgagor pays a second assignee of a mortgage, both parties being ignorant of a prior recorded assignment of the same mortgage; the money cannot be recovered back: *Behring v. Somerville*, 63 N. J. 568, 44 At. R. 641. See *Alton v. First Bank*, 157 Mass. 341.

² *Atty-Gen. v. Perry*, Comyns, 481, is *contra*. But this case is not likely to be followed, unless as a revenue decision.

³ *Youmans v. Edgerton*, 91 N. Y. 403; *Justice v. Charles*, 7 Blackf. 121 (obligor pays by giving note); *Williams v. Rank*, 1 Ind. 230 (the same): see *Marsh v. Low*, 55 Ind. 271.

⁴ *Mar v. Callander*, Mor. Dict. 2927; *Ker v. Rutherford*, Mor. Dict. 2928; *Duke v. Halcraig*, Mor. Dict. 2929.

⁵ *Franklin Bank v. Raymond*, 3 Wend. 69, citing *Price v. Neal*.

⁶ *Davies v. Watson*, 2 Nev. & M. 709; *Chambers v. Miller*, 13 C. B., N. S. 125; *Woodland v. Fear*, 7 E. & B. 519, 521; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Nat. Bank v. Burkhardt*, 100 U. S. 686; *Preston v. Canadian Bank*, 23 Fed. Rep. 179; *City Bank v. Burns*, 68 Ala. 267; *Nat. Bank v. McDonald*, 51 Cal. 64 (*semble*); *First Bank v. Devenish*, 15 Colo. 229, 25 Pac. R. 177; *Peterson v. Union Bank*, 52 Pa. 206; *Hull v. Bank, Dudley (S. Ca.)*, 259. So in Germany. *Postfiscus v. Imhof (Reichs-Gericht, 1889)*, 44 *Seuffert's Archiv*, No. 257; *Anon. (O. L. G., Hamburg, 1887)*, 43 *Seuffert's Archiv*, No. 212.

was still at the bank-counter; but the court held that the money was irrevocably his. In Massachusetts, if not also in New York, the holder is not permitted to keep the money, unless he has changed his position before notice of the mistake.¹ The decisions in those States, it is submitted, are inequitable. Either the holder or drawee must suffer by the misconduct of the drawer in drawing without funds. If the holder has once got the money, there seems to be no reason why a court should take it from him. Furthermore, it seems impossible to reconcile these decisions with those discussed in the preceding two paragraphs and decided in the same jurisdictions. In *Fort Dearborn Bank v. Carter*,² the court was evidently embarrassed by its decisions in favor of the drawee who paid, by mistake, overdrafts. They were disposed of as follows:—

“Whatever may be the distinction between such a case as *Merchants' Bank v. Nat. Bank* ³ (the case of an overdraft paid by mistake), and the case of *Ins. Co. v. Abbott*,⁴ it is manifest the making of a contract or the payment of money under a mistake of fact, as these words are used in the law, is not always followed by the same consequences as the making of a contract or the payment of money in consequence of the fraudulent misrepresentation of a third person.”

This can hardly be regarded as the court's last word upon the subject. It is believed that no convincing reason can be found for discriminating, as the Massachusetts and New York courts do, against a drawee, who has been misled by the fraud of the drawer, and in favor of a drawee, who has acted under a mistake.

One who believes in LORD MANSFIELD's principle that, when one of two innocent persons must suffer by the misconduct of a third, the loss should lie where it has fallen, is destined to disappointment, as he reads the American cases bearing upon the right of the holder, to whom the drawee has paid a bill, which has been altered after its issue by the drawer. If a holder has in good faith purchased a bill, of which the amount has been raised, and the drawee has in

¹ *Merchants' Bank v. Eagle Bank*, 101 Mass. 281; *Merchants' Bank v. Nat. Bank*, 139 Mass. 513 (but see *Boylston Bank v. Richardson*, 101 Mass. 287); *Troy Bank v. Grant, Hill & D.* 119; *Irving Bank v. Wetherald*, 36 N. Y. 335; *Whiting v. City Bank*, 77 N. Y. 363 (*semble*); *Nat. Bank v. Steele*, 11 N. Y. Sup. 538 (but see *Oddie v. Nat. Bank*, 45 N. Y. 735).

² 152 Mass. 34, 25 N. E. Rep. 27.

³ 139 Mass. 513.

⁴ 131 Mass. 397.

like good faith paid it, the payment, it would seem, should have the same effect in favor of the holder, as the payment of a bill on which the drawer's name is forged, or the payment of a bill on the faith of forged bills of lading, or the payment of a bill induced by the drawer's fraud, or of one drawn without funds. Nevertheless, the right of the drawee to recover the money paid upon an altered bill is asserted by many decisions in this country.¹ One who disagrees with these decisions must turn for comfort to the English and continental law. There is, it is true, no express English decision recognizing the holder's right to keep the money paid in such a case, but that the holder need not refund, seems to be a fair inference from *Langton v. Lazarus*.² In France, Germany, Belgium, Switzerland, Italy, Hungary, and Russia it is unquestioned law, that a drawee, who accepts or pays an altered bill, must honor his acceptance, and cannot recover what he has paid.³

Upon whom finally should the loss fall, when a party to a bill or note pays it to a holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged, the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case of the forged indorsement, on the other hand, the bill or note belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted.⁴ When he

¹ *Espy v. Bank*, 18 Wall. 604; *Young v. Lehman*, 63 Ala. 519, 523; *Redington v. Woods*, 45 Cal. 406; *Park v. Roser*, 67 Ind. 500; *Merchants' Bank v. Exchange Bank*, 16 La. 457; *Third Bank v. Allen*, 59 Mo. 310; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Bank of Commerce v. Nat. Association*, 55 N. Y. 211; *Marine Bank v. Nat. Bank*, 59 N. Y. 7; *White v. Continental Bank*, 64 N. Y. 316; *Security Bank v. Bank of Republic*, 67 N. Y. 458; *Nat. Bank v. Westcott*, 89 N. Y. 418; *Nat. Bank v. Seaboard Bank*, 114 N. Y. 28 (*semble*); *City Bank v. Nat. Bank*, 45 Tex. 203.

² 5 M. & W. 629. But the English law is now settled in accordance with the American. *Imperial Bank v. Hamilton Bank*, [1903] A. C. 49.

³ 1 Nouguiet, *Lettre de Change*, 4th ed., § 325; 2 Pardessus, *Cours de Dr. Comm.*, 3d ed., 506, § 453; Wächter, *Wechselrecht*, 481, giving the text of the commercial codes of the countries above mentioned.

⁴ See as to forged transfer of stock, *Sheffield v. Barclay*, [1903] 1 K. B. 1.

collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use.¹ If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defense that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action.² The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder. As a matter of positive law, the maker or acceptor, who pays the holder claiming under a forged indorsement, is allowed to proceed against the latter directly, without first paying the true owner.³ This, as a matter of

¹ *Bobbett v. Pinkett*, 1 Ex. Div. 368, 372; *Indiana Bank v. Holtsclaw*, 98 Ind. 85; *Buckley v. Second Bank*, 35 N. J. 400; *Johnson v. First Bank*, 6 Hun, 124.

² *First Bank v. Bremer*, 7 Ind. App. 685.

³ 1 *Ames Cas. on B. & N.* 433, n. 2; *Star Co. v. N. H. Bank*, 60 N. H. 442; *Corn Bank v. Nassau Bank*, 91 N. Y. 474. Analogous to these cases of forged indorsement are those where the defendant buys a stock certificate, transferred to him by a forged power of attorney, and then surrenders it to the company, taking out a new certificate in his own name. The title of the true owner is not affected thereby. The defendant, having obtained the new certificate by means of the original one of the true owner, holds the new one as a constructive trustee for the latter. The company would be bound to issue a fresh certificate to the true owner, but would of course be entitled to have the one outstanding, to which the original shareholder is equitably entitled, delivered up. So that the loss must fall on the innocent purchaser. *Sims v. Anglo-Am. Co.*, 5 Q. B. D. 188; *Metrop. Bank v. Meyer*, 63 Md. 6. The case of *Boston Co. v. Richardson*, 135 Mass. 473, seems to have gone too far in holding the innocent purchaser liable on an implied warranty of title. The same criticism may be applied to *Merchants' Bank v. First Bank*, 3 Fed. Rep. 66, — a case of forged indorsement, — which was said in *Leather Bank v. Merchants' Bank*, 128 U. S. 26, 37, to proceed "upon grounds inconsistent with the principles and authorities above stated." In the last case the drawee's right to recover of the holder under a forged indorsement, was held to be barred in six years from the time of the payment. This decision, on the theory of subrogation, is clearly right. But, if the case is regarded as an illustration of the right to recover money paid under mistake, it is not to be reconciled with the prevailing doctrine, that the cause of action does not accrue against an innocent receiver until demand, or notice of the mistake.

legal reasoning, is believed to be unwarranted. But as, in the result, the loss comes where upon the principle of subrogation it ought to come, it is not worth while to be too critical.

The principle by which, in a controversy between two persons having equal equities, the holder of the title shall prevail, is most commonly applied for the benefit of a purchaser, who buys a title, without notice of equities attaching to it, in the hands of the seller, in favor of a third person.¹ There is, it must be admitted, one difference between this case of the purchaser and those already discussed, in which the holder of a bill received and the drawee made payment, both acting under the mistaken belief that the bill was genuine and properly payable by the drawee to the holder. The purchaser parts with his money at the time he acquires the legal title, which he claims the right of retaining. The holder, on the other hand, unless there are prior indorsers, gives up nothing of value at the time when he acquires from the drawee the money which he seeks to keep. He parted with his money in a prior transaction, when he obtained the worthless bill. At that moment the loss has fallen upon the holder, and it has been said that he "ought not to be permitted to throw that loss upon another innocent man, who has done no act to mislead him."² But this view seems specious, rather than sound. From the point of view of natural justice, the time of the loss is immaterial.³ If one looks at the fraudulent transaction in its entirety, the equality of the equities between the holder and the drawee is just as obvious as the equality of the equities between the purchaser and the equitable incumbrancer. One or two additional illustrations may be put:—

A creditor sells his claim to A., and afterwards, concealing this sale, sells the claim to B., who in good faith collects it of the debtor.

¹ See 1 Harvard Law Review, 3, 4 *et seq.*; *ante*, p. 255.

² Per CHAMBRE, J., in *Smith v. Mercer*, 6 Taunt. 76, 84. So where X buys a land warrant under a forged assignment in the name of its owner A, and in good faith gets a patent in exchange therefor from the government, he ought to hold the title under the patent in trust for A. But see *contra* *Dixon v. Caldwell*, 15 Oh. St. 412; *Mack v. Brammer*, 28 Oh. St. 508 (*semble*); *Fletcher v. McArthur*, 117 Fed. 393.

³ If, for instance, the money paid by the drawee to the holder should by mistake be repaid to the drawee, the latter could keep it. This happened in *Second Bank v. Western Bank*, 51 Md. 128, where the loss first fell on the holder, who bought a bill drawn without funds; the loss was then thrown upon the drawee by the latter's paying the bill by mistake; but was finally cast upon the holder by his mistake in refunding to the drawee.

B. paid his money for nothing, but surely he ought to be allowed to keep what he has collected, although received after he suffered his loss, and although the loss is thereby thrown on the equally innocent A.¹

Again: A third mortgagee buys the first mortgage in ignorance of the second. The second mortgagee, in justice, cannot prevent the third from tacking his two mortgages, although the second is thereby "squeezed out."²

Another example is found in the singular case of *London Bank v. London Co.*³ Some negotiable bonds were stolen from the defendant's box and sold to the plaintiff, a *bona fide* purchaser. The thief, fearing detection, afterwards, by fraud, got them again from the plaintiff and replaced them in the box of the defendant, who did not learn till later of the theft or replacement of the bonds. The court gave judgment against the plaintiff, on the ground that the defendant was a purchaser for value without notice. It requires a considerable effort of the imagination to find here the elements of a purchase. But the decision seems clearly right, for the equities were equal, and the defendant had the bonds. Here, too, as in the preceding two instances, the loss, which first fell on the defendant, was afterwards transferred to the plaintiff.

The rule as to equal equities is also applicable, although the holder of the legal title parts with his money, neither before nor

¹ In *Judson v. Corcoran*, 17 How. 612, CATRON, J., said, p. 614: "The case is one where an equity was successively assigned in a *chase in action* to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here C. [the junior assignee] has drawn to his equity a legal title to the fund, which legal title J. seeks to set aside. . . . Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." See to the same effect *Mercantile Co. v. Corcoran*, 1 Gray, 75; 40 Seuffert's Archiv, No. 103; 13 *id.*, No. 246; 24 *id.*, No. 234; 31 *id.*, No. 27; 3 Stobbe, Handbuch d. deutschen Privatrechts, 181; Knorr, 42 Archiv für die Civilistische Praxis, 318. In Germany, as generally in the United States, the mere fact that the second assignee first notifies the debtor of his assignment, does not defeat the precedence of the first assignee; but in France, as in England, priority of notice determines the rights of successive assignees.

² A wider generalization has convinced the writer that his opinion to the contrary in 1 Harvard Law Review, 15, *ante*, p. 267, is erroneous. But the English doctrine, which permits tacking by the third mortgagee, even when he has notice of the second mortgage, as in *Taylor v. Russell* (1891), 1 Ch. 8, seems as indefensible as ever. Such a case is hardly to be distinguished from the cases where the holder of a bill collects it with knowledge that it is forged, or drawn without funds, and that the drawee is acting under a mistake. *Supra*, p. 274, n. 2.

³ 21 Q. B. Div. 535. See also *Colonial Bank v. Hepworth*, 36 Ch. D. 36.

contemporaneously with its acquisition, but subsequently thereto. If, for example, a plaintiff pays and the defendant receives money supposed by both to be due from the plaintiff, but really due from X., and the mistake is not discovered until the claim against X. is barred by the Statute of Limitations, or has become worthless by the insolvency of X., the defendant can keep the money. The rule is the same, if the defendant's pecuniary position has become changed in other ways, in consequence of the receipt of the money. Here, again, both parties are innocent, and one of them must suffer; but the defendant, having the legal title to the money, prevails.¹

It is hoped that what has been written may serve to convince the reader of the extensive scope of the doctrine that equity will not interfere as between two persons having equal equities, but will let the loss lie where it has fallen. It will certainly be a satisfaction to the writer, if he has helped to vindicate the opinion of LORD MANSFIELD in *Price v. Neal* from the false gloss that has been put upon it by his successors.

¹ *Brisbane v. Dacres*, 5 Taunt. 144; *Skyring v. Greenwood*, 4 B. & C. 281; *Watson v. Moore*, 33 Law Times, 121; *Union Ass'n v. Kehlror*, 7 Mo. Ap. 150; *Mayer v. State Bank*, 8 Neb. 104, 109; *Union Bank v. Sixth Bank*, 43 N. Y. 452; *Mayer v. Mayor*, 63 N. Y. 253; *White v. Continental Bank*, 64 N. Y. 476; *Curren v. Mayor*, 79 N. Y. 511, 515; *Beam v. Copeland*, 54 Ark. 70, 14 S. W. R. 1094; *Union Bank v. Ontario Bank*, 24 Low. Can. Jur. 309; *Pothier, Obligations*, No. 256; 13 *Duranton, Cours de Droit Français*, § 685. The principle was clearly stated in *Kingston Bank v. Eltinge*, 40 N. Y. 391, but strangely misapplied, the court considering that the plaintiff had the legal title, although the money had been paid to the defendant by the plaintiff's consent. If land had been conveyed, instead of money, it is hardly to be supposed that the court would have treated the legal title as being in the plaintiff; but there is obviously no difference between the two cases in principle. *Durrant v. Eccles. Commissioners*, 6 Q. B. D. 234, is difficult to explain, unless, by reason of the relative positions in life of the parties, the defendant should be held responsible for the consequences of the mistake,

THE FAILURE OF THE "TILDEN TRUST."¹

MELANCHOLY the spectacle must always be, when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction. But society is powerless, in a given case, so long as the forms of law are observed. When, however, charitable bequests have been repeatedly defeated, under cover of law, and that, too, although the beneficent purpose of the testator was unmistakably expressed in a will executed with all due formalities, and although the designated trustees were ready and anxious to perform the trust reposed in them, one cannot help wondering if there is not something wrong in a system of law which permits this deplorable disappointment of the testator's will and the consequent loss to the community. The prominence of the testator, and the magnitude of the "Tilden Trust," which has recently miscarried, have aroused so general an interest that this seems a peculiarly fit time to consider the legal reasons for the failure of that and similar charitable bequests in New York.

Governor Tilden's will is summarized by the majority of the court in *Tilden v. Green*,² as follows: "I request you [the executors] to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient — that is, if you think it advisable and the fit and proper thing to do — convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment, will most substantially benefit mankind."³ The trustees procured the incorporation of the

¹ Reprinted by permission from the *Harvard Law Review* for March, 1892, with manuscript additions by the author.

² 130 N. Y. 29, 28 N. E. R. 880, 887.

³ The writer is by no means convinced that this was a just interpretation of the will, but for the purposes of this article its accuracy is assumed.

"Tilden Trust," and elected to convey the entire residue to that institution. An admirable will and willing trustees — and yet the bequest was not sustained. If the trustees had not elected to give the property to the "Tilden Trust," that institution would have had no claim, nor would there have been, under the law of New York, any means of compelling them to apply it to the alternative charitable purposes. Therefore, the Court of Appeals decided, the trustees could not dispose of the property in either of the two modes indicated in the will, and the entire residue, amounting to some \$5,000,000, must be distributed among the heirs and next of kin.

The question of the proper interpretation of the will apart, the failure of the "Tilden Trust" is due to a combination of two causes: the one legislative, the other judicial. Had the Tilden case arisen in England, or in any of our States, except New York, Michigan,¹ Minnesota,² Maryland,³ Virginia,⁴ and West Virginia,⁵ the trust would have been established. The precise nature of the legislation in New York will be best appreciated by contrasting a private trust with a charitable trust.

A trust, being an obligation of one person to deal with a specific *res* for the benefit of another, cannot be enforced unless there is a definite obligee, that is, a *cestui que trust*, who can file a bill for its specific performance.⁶ Furthermore, as equity follows the law, the rule of perpetuities must apply to trusts as well as to legal estates. By the English and general American law, neither of these doctrines, which are of universal application to private trusts, is extended to charitable trusts. On the one hand, the considerations of public policy, which lie at the foundation of the rule of perpetuities in the case of private property, are obviously inapplicable to property devoted to charity; and, on the other, the specific performance of the charitable trust is abundantly secured through the attorney-general acting in behalf of the State.

In New York, however, the English law of charitable trusts has

¹ Methodist Church v. Clark, 41 Mich. 730. But see White v. Rice, 112 Mich. 403.

² Little v. Willford, 31 Minn. 173; Atwater v. Russell, 49 Minn. 57, 51 N. W. R. 629.

³ Gambel v. Trippe (Md. 1892), 23 Atl. R. 461.

⁴ Stonestreet v. Doyle, 75 Va. 356.

⁵ Bible Society v. Pendleton, 7 W. Va. 79.

⁶ Y. B. 15 Hen. VII. 12 a.

been abolished by statute, and charitable trusts are thereby put upon the same footing as private trusts, with the single exception that property may be given directly to corporations authorized to receive and hold permanently bequests for specified charitable purposes. This exceptional New York legislation seems to the writer an unmixed evil. Any one who follows the reported cases, to say nothing of the unreported instances, for the last fifty years, will be startled at the number of testators whose reasonable wishes have been needlessly disappointed, and at the amount of property which has been diverted from the community at large for the benefit of unscrupulous relatives.¹

Nor has New York, whose legislation in general has been widely copied, made any recent converts to her doctrine of charities. On the contrary, Wisconsin, which at one time followed the New York rule, by the revision of 1878 adopted the English practice with the exception of the so-called *cy-près* doctrine. Virginia, too, which at one time ignored the distinction between private and charitable trusts, has, by statute, sanctioned to a limited extent indefinite charitable trusts.

But even under the New York Statutes, Governor Tilden's charitable purposes, it would seem, might have been accomplished within the rules applicable to private trusts. The objection of remoteness did not exist, for the will was carefully framed so as not to violate the rule of perpetuities; and the objection that there was no definite *cestui que trust* who could compel its performance was obviated by the willingness of the trustees to exercise their option in favor of the "Tilden Trust." Unfortunately, however, the New York courts had adopted a chancery doctrine, which was first stated in *Morice v. Bishop of Durham*.² In that case property was bequeathed to the bishop upon trust to dispose of the same to such objects of benevolence and liberality as he should most approve of. This was obviously not a charitable trust, and, there being no *cestui que trust*, there was no one who could compel its performance. The bishop,

¹ *Owens v. Missionary Society*, 14 N. Y. 380; *Downing v. Marshall*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584; *Adams v. Perry*, 43 N. Y. 487; *White v. Howard*, 46 N. Y. 144; *Holmes v. Mead*, 52 N. Y. 332; *Prichard v. Thompson*, 95 N. Y. 76; *Cottmar v. Grace*, 112 N. Y. 299; *Read v. Williams*, 125 N. Y. 560; *Fosdick v. Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. R. 880.

² 9 Ves. 399, 10 Ves. 521.

however, disclaimed any beneficial interest in himself and was ready, like the trustees in the "Tilden Trust," to apply the property in accordance with the testator's will. But the Master of the Rolls and the Lord Chancellor decided that the trust must fail, and decreed in favor of the next of kin.

One who dissents from a decision of Sir WILLIAM GRANT, affirmed by LORD ELDON, which has remained unchallenged for nearly ninety years, and which has been followed in many later decisions,¹ must realize that he is leading a forlorn hope. Nevertheless the writer, finding himself unable to agree with the conclusion in *Morice v. Bishop of Durham*, ventures to give the reasons for his faith.

It will be granted at the outset that the decision in this case defeated the will of the testator, and that nothing short of an imperative rule of law can ever justify such a result. It is also certain that no such rule of law is mentioned by LORD ELDON. The distinguished chancellor, after saying that the bishop could not hold for his own benefit, disposes of the bishop's willingness to perform the trust in this short and unsatisfactory fashion: "I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust." Sir WILLIAM GRANT seems to have thought that the right of the next of kin resulted from an intestacy as to the beneficial interest.² But the fallacy of this view is demonstrable with almost mathematical conclusiveness. An intestacy, where everything that the testator had passes by his will, is a self-evident contradiction. And yet in *Morice v. Bishop of Durham* all the testator's property did pass by his will to the bishop. If it be said that the legal title passed, but not the equitable interest, the answer is that the absolute owner of property has no equitable

¹ *James v. Allen*, 3 Mer. 17 (*semble*); *Ommaney v. Butcher*, T. & R. 260; *Fowler v. Garlike*, 1 Russ. & M. 232; *Williams v. Kershaw*, 5 Cl. & F. 111 (*semble*); *Harris v. Du Pasquier*, 26 L. T. Rep. 689; *Leavers v. Clayton*, 8 Ch. D. 589; *Adye v. Smith*, 44 Conn. 60; *Chamberlain v. Stearns*, 111 Mass. 267; *Nichols v. Allen*, 130 Mass. 211. But see *Goodale v. Mooney*, 60 N. H. 528.

² "If there be a clear trust, but for uncertain objects, the property that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner." 9 Ves. 399. See, to the same effect, *Levy v. Levy*, 33 N. Y. 97, 102, per WRIGHT, J., and *Holland v. Alcock*, 108 N. Y. 312, 323, per RAPALLO, J.

interest. The use of the words "equitable ownership" and "equitable estate" is so inveterate among lawyers that we do not always remember that these are figurative rather than exact legal terms. An equitable interest is a right *in personam*. It implies, of necessity, a relation between two persons, known as the trustee and the *cestui que trust*. In the case of absolute ownership who is the trustee? An equitable claim by the owner against himself as the holder of the legal title would be an absurdity. Test the matter in another way. Transfer by intestacy is a true succession. The right of the successor is of precisely the same nature as that of his predecessor. The right of the next of kin, as established by LORD ELDON, was a genuine equitable interest. The next of kin were *cestuis que trustent*, the bishop was trustee. In other words, the next of kin had a claim against the person of the bishop. But the testator never had any right against the bishop. How, then, any intestacy?

LORD ELDON and SIR WILLIAM GRANT, furthermore, relied greatly upon the case of *Brown v. Yeall*,¹ where the trust was void as a perpetuity, and their reliance upon this case warrants the belief that the case before them was assimilated, somewhat inconsiderately, to a distinct class of cases, where decrees in favor of the testator's heir or next of kin are eminently just. And this leads us to a consideration of the true principle by which courts of equity dispose of the beneficial interest in property where an intended trust necessarily fails.

If property is conveyed upon trust, and, by some oversight, no beneficiary is designated, or if the beneficiary named is non-existent, or incapable of identification by the trustee, or refuses the gift, or if the trust is for an illegal purpose, the trust must, in the nature of things, fail.

The *res*, which is the subject-matter of the trust, vests, nevertheless, in the trustee. The courts might, conceivably, as LORD ELDON suggested in *Morice v. Bishop of Durham*, have allowed the trustee to hold the *res* for his own benefit, discharged of any trust. In fact, however, they have compelled him to hold the property as a trustee for the creator of the express trust, if he is still living, or for his representative, if he is dead. This equitable right, as we have seen, does not come to the heir or next of kin as an intestate

¹ 7 Ves. 50 n.

succession. The trust comes into being only after the death of the testator. Being the creation of the courts of equity it is a constructive or *quasi* trust, and founded, like all constructive trusts, upon natural justice. The trustee was plainly not intended to take the property for himself; he ought to hold it for some one; and no one, it is obvious, is, in general, so well entitled to the beneficial interest as the creator of the trust or his representative.¹

If, however, as in *Morice v. Bishop of Durham*, and the "Tilden Trust," the performance of the express trust is not impossible nor illegal, even though there is no specific *cestui que trust* named who can compel its performance, the trust does not of necessity fail. Whether it shall fail or not in a given case must depend on the will of the trustee. If the trustee refuses to perform, as there is no one to compel performance, the trust fails, and the trustee, as in the other cases of impossibility and for the same reasons, will be held as a constructive trustee for the creator of the trust or his representative. If, however, the trustee is willing to perform the trust, these reasons lose all their force.

In the one case, where the will of the testator *cannot* be carried out, equity, by interfering, prevents the unjust enrichment of the trustee at the expense of others better entitled.

¹ Sometimes natural justice dictates a different disposition of the beneficial interest, *e. g.*, property is devised upon trust to distribute the same among members of a class; with full discretion as to the proportions and the individuals within the class. The trustee for some reason fails to distribute. The express trust, then, cannot be performed. The trustee, however, as before, ought not to keep the property for himself. But here it is much more consonant with natural justice to create a constructive trust for the equal benefit of all the members of the class than to give it to the testator's representative. Where the class is defined as "relatives," the trustee may, of course, select any relatives, however distant. But, if he makes no selection, an equal distribution among all kinsmen, near and remote, would commonly be impracticable. Equity, therefore, goes a step further and limits the equal distribution to those who would be entitled under the statute of distributions. This solution is doubtless in accordance with the general sense of justice. *Huling v. Fenner*, 9 R. I. 412. The common explanation of these cases, that there is a gift which vests in the class subject to be divested by the exercise of the trustee's discretion in favor of some one or more of the class, seems to be artificial and unsupported by the facts.

Again if property is bequeathed to a trustee for such charitable purposes as he shall designate, and the trustee names none, the express trust cannot be carried out. Equity, however, will treat this as a constructive trust for general charity and frame a scheme. And this disposition of the property, as every one will admit, is a nearer approximation to the testator's probable intention, and therefore more just than to create a constructive trust for his representative. *Minot v. Baker*, 147 Mass. 348, and cases cited.

In the other case, where the will of the testator *can* be fulfilled, equity, by interfering, defeats his will and thus produces the unjust enrichment of the testator's representative at the expense of the intended beneficiary.

In the one case, the impossibility of performing the express trust gives rise to an equitable constructive trust. In the other case, an inequitable constructive trust is what causes the impossibility of performing the express trust. Surely a strange perversion.

It may be said that there can be no trust without a definite *cestui que trust*. This must be admitted. If, for instance, property is given to A. upon trust to convey to such person as he shall think deserving, and A. either refuses to convey to any one, or conveys to B. as a deserving person, there is, properly speaking, no express trust here. In the one alternative the express trust fails; in the other alternative B. gets the legal estate. But it does not follow from this admission that such a gift is void. Even though there be no express trust, there is a plain duty imposed upon A. to act, and his act runs counter to no principle of public policy. Why then seek to nullify his act? The only objection that has ever been urged against such a gift is that the court cannot compel A. to act if he is unwilling. Is it not a monstrous *non-sequitur* to say that therefore the court will not permit him to act when he is willing?

It may be objected that a devise might in this way become "the mere equivalent of a general power of attorney"; but this objection seems purely rhetorical. Suppose a testator to give A. a purely optional power of appointment in favor of any person in the world except himself, with a provision that in default of the exercise of the power the property shall go to the testator's representatives, — or this provision may be omitted altogether, the effect being the same. Such a will is obviously nothing if not the mere equivalent of a general power of attorney. And yet the validity of this power would be unquestioned. If the power is exercised, the appointee takes. If it is not exercised, the testator's representative takes.

Now vary the case by supposing that the testator imposes upon the donee of the power the *duty* to exercise it. Can the imposition of this duty furnish any reason for a different result? In fact A., the donee of the power, has in this case also the option of appointing or not, since, although he ought to appoint, no one can

compel him to do so. Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment where the donee was in honor bound to make it?

It is time enough for the court to interfere when A. proves false to his duty and sets up for himself. Then, indeed, a court of equity ought to turn him into a constructive trustee for the donor or his representative. This contingent right of the heir or next of kin may be safely trusted to secure the performance of his duty by the trustee. And its existence is a full answer to the suggestion of Sir WILLIAM GRANT in *Morice v. Bishop of Durham*, and of Mr. Justice RAPALLO in *Holland v. Alcock*,¹ that the trustee could keep the property without accountability to any one, if the beneficial interest were not given unconditionally to the heir or next of kin immediately upon the testator's death. The position of the heir or next of kin is, in substance, the same as in cases where property is given to them subject to a purely optional power of appointment in another to be exercised, if at all, within a reasonable time. Sir WILLIAM GRANT himself said, in *Gibbs v. Rumsey*,² which was such a case: "The claim of the heir or next of kin is premature until it shall be seen whether any appointment will be made."

We may appeal from Mr. Justice RAPALLO in *Holland v. Alcock* to the opinion of the same distinguished judge in *Gilman v. McArdle*.³ In each of these cases there was a trust for the same indefinite object, namely, the celebration of masses for the soul of the creator of the trust. In the former case the trust was expressed in a will, in the other case the trust was annexed to a conveyance *inter vivos*. In neither case was there any mode of compelling the specific performance of the trust. And yet the court would not allow the trustee under the will to perform the trust, but compelled him to surrender the trust property to the testator's representative; whereas the same court refused to prevent the trustee under the conveyance *inter vivos* from performing the trust, and decided that the right of the grantor's representative to the trust property was contingent upon the refusal of the trustee to perform the trust. The distinction was said to result from the fact that there was a contract in *Gilman v. McArdle*. But what difference could the con-

¹ 108 N. Y. 323.

² 2 V. & B. 299.

³ 99 N. Y. 451.

tract make beyond giving a right to sue at law for damages upon its breach? The duty to perform the trust was as cogent upon the trustee under the will as upon the trustee under the conveyance. In each case, and for the same reasons, the breach of that duty would give rise to an equitable obligation against the trustee to surrender the property which had been given to him upon confidence that he would perform the trust. And in neither case is there any assignable reason for creating this equitable obligation before any default in the trustee.

Although *Morice v. Bishop of Durham* has never been directly impeached, either in England or this country, there are several groups of cases, undistinguishable from it in principle, in which the equity judges have declined to interfere, at the suit of the next of kin, to prevent the performance of a purely honorary trust.

*Mussett v. Bingle*¹ is one illustration. The testator bequeathed £300 upon trust for the erection of a monument to his wife's first husband. It was objected that the trust was purely honorary; that is, that there was no beneficiary to compel its performance. But the trustee being willing to perform, *HALL, V. C.*, sustained the bequest. In the similar case of *Trimmer v. Danby*,² *KINDERSLEY, V. C.*, said: "I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument; but if . . . the trustees [*i. e.*, the executors] insist upon the trust being executed, my opinion is that this court is bound to see it carried out." There are many American decisions to the same effect.³

*Gott v. Nairne*⁴ is another case at variance with *Morice v. Bishop of Durham*. In that case £12,000 were bequeathed to trustees, on trust at their discretion to buy an advowson and nominate to it such person as they should think proper. Subject to this trust,

¹ W. N. [1876] 170.

² 25 L. J. Ch. 424. See, further, *Masters v. Masters*, 1 P. Wms. 423; *Mellick v. Asylum*, Jacob, 180; *Limbre v. Gurr*, 6 Mad. 151; *Adnam v. Cole*, 6 Beav. 353.

³ *Gilmer v. Gilmer*, 42 Ala. 9; *Johnson v. Holifield*, 79 Ala. 423, 424; *Cleland v. Waters*, 19 Ga. 35, 54, 61; *Detwiller v. Hartman*, 37 N. J. Eq. 347 (a \$40,000 monument); *Wood v. Vandenburg*, 6 Paige, 277; *Emans v. Hickman*, 12 Hun, 425; *Re Frazer*, 92 N. Y. 239; *Hagenmeyer v. Hanselman*, 2 Dem. 87, 88 (but see *Re Fisher*, 8 N. Y. Sup. 10); *Bainbridge's App.*, 97 Pa. 482; *Fite v. Beasley*, 12 Lea, 328; *Cannon v. Apperson*, 14 Lea, 553, 590.

⁴ 3 Ch. D. 278, 35 L. T. Rep. 209 s. c.

the advowson was to be held in trust for A. until he should have a benefice worth £1,000 a year, or died. Until the advowson was bought the fund was to accumulate, and at the end of twenty-one years, or at A.'s death, or on his being presented to a benefice worth £1,000 a year, the fund was to belong to A., his executors and administrators, absolutely. The fund accumulated for twelve years. No advowson had been purchased, but the trustees did not desire to renounce the trust. Under the English rule, which gives a *cestui que trust*, who has the entire beneficial interest in property, the right to have a conveyance of the legal title, A. claimed to have the fund transferred to him. The bill was dismissed on the ground that A. had not the exclusive interest; for the trustees, though not compellable, were yet at liberty to nominate some person other than A. HALL, V. C., after remarking that the trustees disclaimed any beneficial interest and desired to perform the trust, added: "I see no reason why the trustees should not be allowed to carry out this trust."

A bequest for the celebration of masses for the soul of a deceased person is, in Ireland,¹ an honorary trust. No one can file a bill to compel its performance. But if the trustee is willing to comply with the testator's direction, the next of kin cannot interfere to prevent him.²

The most conspicuous illustration of the doctrine which is here advocated is to be found in the recent English case of *Cooper-Dean v. Stevens*.³ There was in this case a bequest of £750 for the maintenance of the testator's horses and dogs. It was urged by the residuary legatee, on the authority of *Morice v. Bishop of*

¹ In Massachusetts and Pennsylvania a bequest for masses is a good charitable trust. *Schouler's Pet.*, 134 Mass. 426; *Seibert's Ap.*, 18 W. N. (Pa.) 276. In England such a bequest is void, as a superstitious use. *West v. Shuttleworth*, 2 M. & K. 684; *Re Fleetwood*, 15 Ch. D. 596; *Elliott v. Elliott*, 35 Sol. J. 206.

² *Commissioners v. Wybrants*, 7 Ir. Eq. 34, n.; *Read v. Hodgins*, 7 Ir. Eq. 17; *Brennan v. Brennan*, Ir. R. 2 Eq. 321; *Dillon v. Rielly*, Ir. R. 10 Eq. 152; *Att'y-Gen. v. Delaney*, Ir. R. 10 C. L. 104; *Bradshaw v. Jackman*, 21 L. R. Ir. 12; *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Perry v. Tuomey*, 21 L. R. Ir. 480. The Court of Appeals has consistently maintained the opposite view in *Holland v. Alcock*, 108 N. Y. 312; *O'Connor v. Gifford*, 117 N. Y. 275, 280. See *Re Howard's Est.*, 25 N. Y. Sup. 1111; see also *Alabama, Festorazzi v. St. Joseph's Church*, 104 Ala. 327, 18 So. R. 394. (But see *Hagenmeyer v. Hanselman*, 2 Dem. 87. Even in New York a gift *inter vivos* for the celebration of masses for the soul of the donor is valid. *Gilman v. McArdle*, 99 N. Y. 451.)

³ 41 Ch. D. 552.

Durham, that this trust must fail, although the trustees desired to perform it. But the trust was upheld. NORTH, V. C., disposed of the plaintiff's argument as follows: "It is said that the provision made by the testator in favor of his horses and dogs is not valid; because (for this is the principal ground upon which it is put) neither a horse or dog could enforce the trust; and there is no person who could enforce it, . . . and that the court will not recognize a trust unless it is capable of being enforced by some one. I do not assent to that view. There is no doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church, or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid; although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities it would be illegal. But a trust to lay out a certain sum in building a monument . . . is, in my opinion, a perfectly good trust, although I do not see who could ask the court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it. Is there anything illegal or obnoxious to the law in the nature of the provision — that is, in the fact that it is not for human beings, but for horses and dogs?" The vice-chancellor answered this question in the negative, and added, "There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void."¹ The learned reader will observe the care with which the distinction is drawn between trusts for a legal purpose and trusts for illegal purposes — the precise distinction which LORD ELDON seems to have overlooked in *Morice v. Bishop of Durham*.

This distinction between an illegal trust and a valid, though

¹ See to the same effect *Mitford v. Reynolds*, 16 Sim. 105; *Fable v. Brown*, 2 Hill, Ch. 378, 382; *Skrine v. Walker*, 3 Rich. Eq. 262, 269.

merely honorary, trust is well brought out by some decisions in the Southern States before the war. A bequest upon trust to emancipate a slave in a slave State was void, it being against public policy to encourage the presence of free negroes in a slave-holding community. But a bequest upon trust to remove a slave into a free State and there emancipate him was not obnoxious to public policy, and although the slave could not compel the trustee to act in his behalf, still the courts acknowledged the right of a willing trustee to give the slave his freedom in a free State.¹ The reasoning of the courts is similar to that already quoted. RICE, C. J., for example, in *Hooper v. Hooper*² says: "The Court of Chancery will recognize the *authority* of the executor to execute the trust. . . . But the slave cannot enforce its execution by suit. . . . The trust is one of that class which may be valid, and yet not capable of being enforced against the trustee by judicial tribunals." So in *Cleland v. Waters*,³ per STARNES, J.: "At all events, if the executors do send him out of the country, no one can gainsay him. . . . Where there is no municipal law forbidding it, the testator can certainly make such a law for himself in his will, and the same reason exists why the executor should carry it into effect as why he should erect a monument or tombstone if so directed by the testator's will. It will not be disputed . . . that it would be the duty of the executor to carry such direction into effect, and that he would be sustained by a court of justice in so doing. . . . Yet it could not be said that the tombstone had any right in the premises, or perhaps that any remedy lay against the executors, by which the erection of the stone could be enforced."

The true doctrine is nowhere better stated than by BUCKNER, C., in *Ross v. Duncan*:⁴ "The ground was taken that, as the negroes for whose benefit the trust was raised can maintain no suit in our courts to enforce it, and there being no one who can enforce it, the trust is void. The conclusion does not necessarily

¹ *Hooper v. Hooper*, 32 Ala. 669; *Sibley v. Marian*, 2 Fla. 553; *Cleland v. Waters*, 19 Ga. 35; *Ross v. Vertner*, 6 Miss. 305; *Thompson v. Newlin*, 6 Ired. Eq. 380, 8 Ired. Eq. 32; *Frazier v. Frazier*, 2 Hill, Ch. (S. C.) 304 (practice forbidden by statute in 1841 as against policy of slave states: see *Finley v. Hunter*, 2 Strob. Eq. 208, 214; *Gordon v. Blackman*, 1 Rich. Eq. 61; *Henry v. Hogan*, 4 Humph. 208; *Purvis v. Shannon*, 12 Tex. 140; *Armstrong v. Jowell*, 12 Tex. 58; *Elder v. Elder*, 4 Leigh. 252.

² 32 Ala. 669, 673.

³ 19 Ga. 35, 61.

⁴ *Freem. Ch. (Miss.)* 587, 603.

follow from the premises. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interfere to prevent it, but would leave its execution to the voluntary action of the trustee. A person may convey his property upon what trust or condition he pleases, so that it be not against law; and the court would only interfere at the instance of the heirs or distributees of the grantor or testator when there had been a failure or refusal to perform the condition or trust."

Whether, then, *Morice v. Bishop of Durham* be considered from the point of view of principle, or in the light of the subsequent adverse decisions, it seems clear that LORD ELDON's opinion ought not to be followed unless by courts irrevocably bound by their own precedents. Unfortunately the New York Court of Appeals was thus hampered when the Tilden case came before it.

In *Holland v. Alcock*,¹ the point had been taken, but without success, that the trustee, though not compellable to perform an honorary trust, should not be prevented from doing so. We must believe that no one of the numerous authorities in support of this position was brought to the attention of the court in that case, for Mr. Justice RAPALLO made the surprising statement that the trustee's contention had never been sanctioned by any decision. *Holland v. Alcock* was followed in *O'Connor v. Gifford*² and *Reed v. Williams*.³ Hence the subsequent failure of the "Tilden Trust."

¹ 108 N. Y. 312.

² 117 N. Y. 275.

³ 125 N. Y. 560.

NOVATION.¹

WHENEVER there is a change in one of the parties, or in the form of an obligation the substance of which remains the same, there is said to be a novation.² We have borrowed the name from the Roman law, but the institution itself is of native growth. Novation in the Roman law was effected by the *stipulatio*. But we have nothing in our law corresponding to the Roman stipulation. Novation, by a change in the form of the obligation, as by the substitution of a specialty for a simple contract, has existed in English law from time immemorial under the name of merger. But our novation by a change of parties, whether by the intervention of a new creditor (*novatio nominis*) or by the substitution of a new debtor (*novatio debiti*), is a modern institution. The earliest judicial recognition of the doctrine seems to be the oft-quoted opinion of Mr. Justice BULLER in 1759:—

“Suppose A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100: B.’s debt is extinguished, and C. may recover the sum against A.”

That this doctrine had no place in the ancient common law appears clearly from the following case of the year 1432:—

“*Rolf*. In case B. is indebted to C. in £20, and A. buys a chattel of B. for £20, so that A. is his debtor for so much; if A. comes and shows C. how B. is indebted to C. in £20, and how A. is indebted to B. in £20 by reason of the purchase, and A. grants to C. to pay C. the £20 which A. owes, and that B. shall be discharged of his debt to C., and C. agrees to this, and B. also, A. shall now be charged to C. for this debt by his contract and own act.

“*Quod COTESMERE, J., negavit*, and said, although all three were of one accord that A. should pay the money to C., this is only a *nudum pactum*, so that for this C. cannot have an action.

¹ Reprinted by permission from the Harvard Law Review for November, 1892, with manuscript additions by the author.

² The writer desires to acknowledge his obligations to Mr. Edmund A. Whitman, whose article on Novation in 16 Am. and Eng. Encyc. of Law, 862, is, by far, the most valuable essay upon the subject in our language.

"Rolf. I say this is not a *pactum nudum*, but *pactum vestitum*, for there was a contract between B. and C., and also between A. and B., so that this accord between them is not *pactum nudum*. But when I grant to pay a certain sum to a man, or when I grant to pay the duty of another to whom I am not indebted, that is *pactum nudum*, because in the first case there is no contract, and in the last case there is no contract or duty between me and him for whom I grant to pay, so that for this he cannot have an action. But in my case there is a contract by the duty between A. and B. for whom A. grants, and between B. and C. to whom A. grants, to pay the debt. So *pactum vestitum*, for which he shall have an action, wherefore, etc.

"COTESMERE, J. It is *nudum pactum* in both cases, for although all three are agreed that A. shall pay this debt for B., still B. is not discharged of his debt in any manner. *Quod TOTA CURIA concessit.*"¹

At the time of this decision B., the old obligor, could be discharged only by a release under seal, or by an accord and satisfaction; that is, an accord fully performed. Furthermore, the action of assumpsit being then unknown, the new obligor must be liable, if at all, in debt. But there could be no debt in the absence of a *quid pro quo*, and A., the new obligor, received nothing in exchange for his assumption of B.'s obligation. The two essential features of a novation — namely, the extinguishment of the original obligation, and the creation of a new one in its place — were therefore both wanting in the case supposed. In other words, novation by simple agreement of the parties was at that time a legal impossibility.

The first step towards the modern novation is illustrated by the case of *Roe v. Haugh*² (1697). The count alleged that B. was indebted to C. in the sum of £42, and that A., in consideration that C. would accept A. as his debtor for the £42 in the room of B., undertook and promised C. to pay him the said £42, and that C., trusting to A.'s promise, accepted A. as his debtor. But there was no averment that C. discharged B. After a verdict and judgment for C., the plaintiff, it was insisted in the Exchequer Chamber "that this was a void assumpsit; for except B. was discharged, A. could

¹ Y. B. 11 Hen. VI. f. 35, pl. 30.

² 12 Mod. 133; 1 Salk. 29; 3 Salk. 14, 8. C.

not be chargeable." Three judges were of this opinion. "But POWIS, B., NEVILL, J., LECHMERE, B., and TREBY, C. J. [thought?], that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of A., for as such it would not bind him except B. was discharged; but they would construe it to be a mutual promise, viz., that A. promised to C. to pay the debt of B., and C. on the other hand promised to discharge B., so that though B. be not actually discharged, yet if C. sues him, he subjects himself to an action for the breach of his promise."

As a consequence of the introduction of the action of *assumpsit*, there was in this case one of the marks of a novation, — the liability of a new obligor; but the other, the liberation of the old obligor, was still wanting, for the creditor might, notwithstanding his agreement, sue on the old debt. His right of action, however, must be in the long run a barren one; for whatever he recovered he must refund as damages for the breach of his promise not to sue. Equity, to prevent the scandal of two actions where there ought to be none, would have enjoined the first action; and it is not surprising that the common law judges should ultimately have allowed the promise not to sue to operate as a legal bar, on the principle of avoiding circuity of action. In *Lyth v. Ault*,¹ a creditor of two persons agreed to take the obligation of one of them in the place of his claim against them both. PARKE, B., said, p. 674: "As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action."²

As soon as this final step was taken, the process of effecting a novation became extremely simple. To convert a claim of C. against B. into a claim of C. against A. it is only necessary for C. and A. to enter into a bilateral contract, in which C. promises never to sue B., and A. promises to pay to C. the amount due from B.

¹ 7 Ex. 669.

² See also *Bird v. Gammon*, 2 B. N. C. 663; *Bilborough v. Holmes*, 5 Ch. D. 255; *Underwood v. Lovelace*, 61 Ala. 155; and especially *Corbett v. Cochran*, 3 Hill, S. C. 41, where the rationale of novation is admirably described. "Generally when there is a novation the release of the original debtor is the consideration for the contract." VAUGHAN WILLIAMS, J., *In re Errington*, [1894] 1 Q. B. 11, 14.

C.'s promise operating as an equitable release, now pleadable as a defense at law, the claim of C. against B. disappears, while A.'s promise creates in its place the new claim of C. against A.

The difficulty in novation cases is therefore no longer one of law, but of fact; namely, Has the creditor entered into the bilateral contract with the new debtor? This question has come up frequently in recent times when a new corporation has acquired the assets and assumed the liabilities of an old company.¹

The same question arises still oftener when a partnership transfers its assets to a new firm or to an individual, and the transferee assumes the payment of the debts of the transferor.² And there are, of course, many other occasions when it may be desirable to bring about a substitution of debtors.³

¹ The evidence was sufficient to establish a novation in *Re Times Co.*, 5 Ch. 381; *Re Anchor Co.*, 5 Ch. 632; *Re Medical Co.*, 6 Ch. 362; and *Miller's Case*, 3 Ch. Div. 391, where accordingly the old company was discharged; and in *Re British Co.*, 12 W. R. 701; *Burns v. Grand Lodge*, 153 Mass. 173, where the new company was held liable to the creditor.

The novation was not proved in *Re Manchester Association*, 5 Ch. 640; *Griffith's Case*, 6 Ch. 374; *Conquest's Case*, 1 Ch. Div. 334; *Blundell's Case*, Eur. Ass. Arb. 39; *Coghlan's Case*, Eur. Ass. Arb. 31; *Bristol Co. v. Probasco*, 64 Ind. 406, where, therefore, the old company continued liable; and in *Re Commercial Bank*, 16 W. R. 958; *Re Smith*, 4 Ch. 662; *Re Family Society*, 5 Ch. 118; and *Re India Co.*, 7 Ch. 651, where the new company was not chargeable.

² The reported cases of novation under these circumstances are legion; the following may serve as illustrations. The novation being complete, the old firm was discharged in *Thompson v. Percival*, 5 B. & Ad. 925; *Lyth v. Ault*, 7 Ex. 669; *Bilborough v. Holmes*, 5 Ch. D. 255; *Luddington v. Bell*, 77 N. Y. 138; and the transferee was charged in *Ex parte Lane*, De Gex, 300; *Rolfe v. Flower*, L. R. 1 P. C. 27; *Lucas v. Coulter*, 104 Ind. 81. On the other hand, the evidence being insufficient to establish a bilateral agreement between the creditor and the transferee of the firm, there was in the following cases no novation: *Thomas v. Shillaber*, 1 M. & W. 124; *Eagle Co. v. Jennings*, 29 Kans. 657; *Wilder v. Fessenden*, 4 Met. 12.

³ The mutual assent to a novation being proved, the old debtor was discharged in *Brown v. Harris*, 20 Ga. 403; *Anderson v. Whitehead*, 55 Ga. 277; *Struble v. Hake*, 14 Ill. Ap. 546; *McClellan v. Robe*, 93 Ind. 298; *Foster v. Paine*, 63 Iowa, 85; *Besshear v. Rowe*, 46 Mo. 501; *Thorman v. Polye*, 13 N. Y. Sup. 823; and the new obligor was held liable in *Browning v. Stallard*, 5 Taunt. 450; *Goodman v. Chase*, 1 B. & Ald. 297; *Bird v. Gammon*, 3 B. N. C. 883; *Butcher v. Steuart*, 11 M. & W. 847; *Re Rotheram*, 25 Ch. Div. 103, 109; *Carpenter v. Murphree*, 49 Ala. 84; *Underwood v. Lovelace*, 61 Ala. 155; *Barringer v. Warden*, 12 Cal. 311; *Welch v. Kenny*, 49 Cal. 49; *Packer v. Benton*, 35 Conn. 343; *Kerr v. Porter*, 4 Houst. 297; *Harris v. Young*, 40 Ga. 65; *Edenfield v. Canaday*, 60 Ga. 456; *Runde v. Runde*, 59 Ill. 98; *Grover v. Sims*, 5 Blackf. 498; *Walker v. Sherman*, 11 Met. 170; *Wood v. Corcoran*, 1 All. 405; *Osborn v. Osborn*, 36 Mich. 48; *Mulcrone v. America Co.*, 55 Mich. 622; *Yale v. Edgerton*, 14 Minn. 194; *Wright v. McCully*, 67 Mo. 134; *Smith v. Mayberry*, 13 Nev. 427; *Van*

We have thus far considered only novations effected by a change of debtors (*novatio debiti*). But a novation may also be accomplished by the substitution of a new creditor for an old one (*novatio nominis*). The problem is here how to convert a claim of X. against Z. into a claim of Y. against Z. The desired result is commonly attained by two successive transactions. In the first place, X. assigns to Y. his claim against Z. This assignment, being legally the grant of an irrevocable power of attorney to Y. to sue Z. in the name of X., makes Y. practically *dominus* of the claim. But it does not create a direct relation between Y. and Z. Even under codes allowing Y. to sue in his own name, Y. is not a true successor to X.¹ Y., however, being *dominus* of the old claim against Z., may enter into a bilateral contract with Z., Y. promising never to enforce the old claim in consideration of Z.'s direct promise to him to pay him the amount of the old claim. The promise of Y. operates as an equitable release of the old claim of X. against Z., and at the same time is a valid consideration for the new claim of Y. against Z. The novation is therefore complete. The right of Y. to bring an action in his own name against Z., independently of any statute permitting an assignee to sue in his own name, because of Z.'s direct promise to Y., has been almost everywhere recognized.²

Epps v. McGill, Hill & D. 109; Bacon v. Daniels, 37 Oh. St. 279; Ramadale v. Horton, 3 Barr, 330; Corbett v. Cochran, 3 Hill, S. C. 41; Scott v. Atchison, 36 Tex. 76; Williams v. Little, 35 Vt. 323.

The fact of novation was not proved in Cuxon v. Chadley, 3 B. & C. 591; Wharton v. Walker, 4 B. & C. 163; Fairlie v. Denton, 8 B. & C. 395; Brewer v. Winston, 46 Ark. 163; Gyle v. Schoenbar, 23 Cal. 538; Decker v. Shaffer, 3 Ind. 187; Davis v. Hardy, 76 Ind. 272; Jacobs v. Calderwood, 4 La. An. 509; Jackson v. Williams, 11 La. An. 93; Choppin v. Gobbold, 13 La. An. 238; Rowe v. Whittier, 21 Me. 545; Curtis v. Brown, 5 Cush. 488; Furbush v. Goodnow, 98 Mass. 296; Caswell v. Fellows, 110 Mass. 52; Halst v. Frances, 31 Mich. 113; Johnson v. Rumsey, 28 Minn. 531; Vanderline v. Smith, 18 Mo. Ap. 55; Jawdon v. Randall, 47 N. Y. Sup'r Ct. 374; Styron v. Bell, 8 Jones, N. C. 222; Jones v. Ballard, 2 Mill, C. R. 113; Lynch v. Austin, 51 Wis. 287; Spycher v. Werner, 74 Wis. 456.

¹ 3 Harvard Law Review, 341; see Moyle, Justinian, 466.

² Israel v. Douglas, 1 H. Bl. 239 (justly criticised, because the count was not in special assumpsit); Moore v. Hill, Peake's Add. Cas. 10; Surtees v. Hubbard, 4 Esp. 203; Lacy v. McNeil, 4 D. & Ry. 7; Wilson v. Coupland, 5 B. & Al. 228; Noble v. Nat. Co., 5 H. & N. 225; Griffin v. Weatherby, L. R. 3 Q. B. 753; Tiernan v. Jackson, 5 Pet. 580 (*semble*); Howell v. Reynolds, 12 Ala. 128; Indiana Co. v. Porter, 75 Ind. 428; Cutter v. Baker, 2 La. An. 572; Lang v. Fiske, 11 Me. 385; Smith v. Berry, 18 Me. 122; Warren v. Wheeler, 21 Me. 484; Farnum v. Virgin, 52 Me. 577; Getchell v. Maney, 69 Me. 442, 443 (*semble*); Barger v. Collins, 7 Har. & J. 213; Austin v. Walsh,

An instructive illustration of this form of novation is found in the custom by which insurance companies assent to the assignment of their policies.¹

The practical differences between the position of an assignee of the old debt and a promisee under the new promise are considerable.

(1) The assignee must sue subject to any set-off which the debtor may have against the assignor; the promisee under the new promise cannot be affected by any such set-off.

(2) If the old claim was in the form of a specialty, the assignee must sue in covenant, but the new promisee must sue in assumpsit; the period of limitation would be different accordingly in the two cases.²

(3) By statute in certain jurisdictions unrecorded assignments of wages are invalid against a trustee process. But the new promisee cannot be affected by these statutes, for the novation destroys the claim of the employee, so that there is nothing due to him from the employer.³

Although a substitution of creditors is in general to be worked out by means of an assignment of the claim and a bilateral contract between the assignee and the debtor, a *novatio nominis* may in certain cases be accomplished in a different mode. A creditor, X., who desires to make a gift to Y. of his claim against Z. has only to enter into a bilateral contract with Z., X. promising never to sue Z., in consideration of Z.'s promise to him to pay the amount of the debt to Y. Y., the donee, it is true, is not the promisee; but inasmuch as the promise is made exclusively for his benefit, he should

2 Mass. 401; Crocker v. Whitney, 10 Mass. 316; Mowry v. Todd, 12 Mass. 281; Armsby v. Farnam, 16 Pick. 318; Bourne v. Cabot, 3 Met. 305; Eastern Co. v. Benedict, 15 Gray, 289; Blair v. Snover, 5 Halst. 153; Currier v. Hodgdon, 3 N. H. 82; Wiggin v. Damrell, 4 N. H. 69; Thompson v. Emery, 27 N. H. 269; Boyd v. Webster, 58 N. H. 336; Compton v. Jones, 4 Cow. 13; Quinn v. Hanford, 1 Hill, 82; Phillips v. Gray, 3 E. D. Sm. 69; Ford v. Adams, 2 Barb. 349; Esling v. Zantzinger, 13 Pa. 50; Clarke v. Thompson, 2 R. I. 146; DeGroot v. Derby, 7 Rich. 118; Anderson v. Holmes, 14 S. C. 162; Mt. Olivet Co. v. Shubert, 2 Head, 116; Westcott v. Potter, 40 Vt. 271, 276; Bacon v. Bates, 53 Vt. 30; Brooks v. Hatch, 6 Leigh, 534.

¹ Wilson v. Hill, 3 Met. 66; Fuller v. Boston Co., 4 Met. 206; Kingsbury v. N. E. Co., 8 Cush. 393; Phillips v. Monument Co., 10 Cush. 350; Burroughs v. State Co., 97 Mass. 359; Barnes v. Co., 45 N. H. 21, 24.

² Warren v. Wheeler, 21 Me. 484; Compton v. Jones, 4 Cow. 13.

³ Denver Co. v. Smeeton, 2 Colo. Ap. 126, 29 Pac. R. 815; Stinson v. Caswell, 71 Me. 510; Clough v. Giles, 64 N. H. 73. But see Knowlton v. Cooley, 102 Mass. 233; Mansard v. Daley, 114 Mass. 408.

be allowed to sue upon it, if not at law, at least in equity. Even in England, where the rule denying an action to any one but the promisee is most rigidly enforced, there are several cases where the donee in the case supposed has been allowed to recover against Z.¹ The reasoning in these cases, it must be admitted, is far from satisfactory, the courts in some of them having so far lost sight of fundamental distinctions as to call Z., the debtor, a trustee.²

We have hitherto dealt with the problem of novation in its simplest form. Given a debt from B. to C., in what way could a new creditor be substituted in the place of C. (*novatio nominis*), or a new debtor in the room of B. (*novatio debiti*)? But it often happens that there are two debts at the outset, both of which it is desired to suppress in the formation of a third. A., for example, may be indebted to B., and B. to C., and the three parties may wish to extinguish the claim of B. against A. and that of C. against B., leaving in their stead a claim of C. against A. This object is easily attained at the present day. Let C. enter into a unilateral contract with B., C. promising never to sue B., in consideration of the assignment to C. of B.'s claim against A. Then let C., who is now *dominus* of the claim of B. against A., make a bilateral contract with A., C. promising never to enforce the assigned claim against A. in consideration of A.'s direct promise to C. to pay him the amount of that claim. C.'s promise to B., operating as an equitable release, discharges the claim of C. against B.; and C.'s promise to A., likewise operating as an equitable release of the assigned claim of B. against A., that is discharged also, and the new claim of C. against A. alone remains.

In the process just described, the unilateral contract between C. and B. precedes the bilateral contract between C. and A., and the presence of all three parties is not required. But this compound

¹ *McFadden v. Jenkins*, 1 Ph. 153; *Rycroft v. Christy*, 3 Beav. 238; *Meert v. Moessard*, 1 Moo. & P. 8; *Roberts v. Roberts*, 12 Jur. N. S. 971; *Parker v. Stone*, 38 L. J. Ch. 46. See also the American cases, *Eaton v. Cook*, 25 N. J. Eq. 55; *Minchin v. Merrill*, 2 Ed. 333, 339; *Hurlbut v. Hurlbut*, 49 Hun, 189. The evidence was insufficient to prove the creditor's agreement to give up his claim against the debtor in *Re Caplen's Estate*, 45 L. J. Ch. 280, and *Evans's Estate*, 6 Pa. Co. 437. It was decided, also, that there was no novation in *Gaskell v. Gaskell*, 2 Y. & J. 502, and *Chandler v. Chandler*, 62 Ga. 612; but these cases seem to be erroneous. The former was criticised adversely in *Vandenberg v. Palmer*, 4 K. & J. 204, 214, 215.

² See especially *McFadden v. Jenkins*, 1 Ph. 153; Ames, *Cases on Trusts*, 2d ed., 47, 48, n. 1.

novation may be effected in another mode, which does require the presence of A., B., and C., and involves the contemporaneous formation of three bilateral contracts, as follows:—

- (1) Between B. and A., B. promising to give up his claim against A. for A.'s promise to him to pay to C. the latter's claim against B.
- (2) Between C. and B., C. promising to give up his claim against B. for B.'s promise to give up his claim against A.
- (3) Between C. and A., C. agreeing to give up his claim against B. for A.'s direct promise to C. to pay him the amount of that claim.¹

In other words, each of the three makes his own promise to do the same thing, in consideration of a counter promise from each of the others. The promises not to enforce the old claims have the effect of extinguishing those claims, and, as in the other process, the promise of A. to pay C. alone remains.²

The novation which results from the substitution of an obligation of A. to C., in the place of the two debts of A. to B. and B. to C., may be accomplished in still another mode, if, in addition to the change of parties, there is also a change in the form of the obligation. The parties, for example, often prefer to put the new obligation into the form of a covenant or negotiable note. In such cases, whether the novation is worked out by successive or by contemporaneous agreements, none of the agreements is bilateral. If B. assigns to C. his claim against A. for C.'s promise to release B., and A. subsequently gives his note or covenant to C., there is first the unilateral contract binding C. to B., and afterwards A.'s specialty obligation to C., the giving of which forms the consideration for C.'s unilateral contract binding him not to enforce the assigned claim of B. against A. If, on the other hand, by the contemporaneous assent of A., B., and C., A. gives his note or covenant to C., we have, as before, the specialty obligation of A. to C., the giving of which forms the consideration for two unilateral contracts, one

¹ Since A., in the case above supposed, assumes the liability of B. to C., there is a *novatio debiti*. A.'s promise might have taken the form of an undertaking to pay to C. his own debt to B., which would have made a *novatio nominis*.

² Illustrations of a novation where two debts are extinguished may be found in *Fairlie v. Denton*, 8 B. & C. 395; *Cochrane v. Green*, 9 C. B. N. S. 448; *Barniger v. Warden*, 12 Cal. 311; *Lester v. Bowman*, 39 Iowa, 611; *Finan v. Babcock*, 58 Mich. 301; *Heaton v. Angier*, 7 N. H. 397; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 16 N. H. 580; *Cotterill v. Stevens*, 10 Wis. 422; *Cook v. Barrett*, 15 Wis. 596.

with B. binding him not to sue A., and one with C. binding him not to sue B. It is further to be noticed that the obligation of A. to C. being an abstract promise to pay C. a fixed amount of money, and not a concrete promise to pay C. either what A. owes B. or what B. owes C., the difference between a *novatio debiti* and a *novatio nominis* disappears in this form of novation.

This distinction between an abstract and a concrete promise is of practical importance in determining a question upon which there is much diversity of opinion among Continental writers, namely: To what extent may A. urge against C., suing on the new obligation, defenses which were open to A. against B., or to B. against C., on the old and extinguished obligations?

This question may be best answered by considering separately the typical cases of novation.

(1 a.) A. promises C. to pay him what A. owes B., for C.'s promise to release B., or, in case B. has assigned to C. his claim against A., for C.'s promise not to enforce the assigned claim. If A. had a defense against B., and so was not liable to him, by the very tenor of his promise he cannot be charged by C. If, on the other hand, A. had no defense against B., but B. had a defense against C., A. must perform his promise. For A., having been released from his debt to B., has no answer to an action on his promise to C. C., however, because of the failure of consideration between him and B., must hold his promise as a constructive trustee for B.

(1 b.) A. gives his note to C. upon the understanding that B.'s claim against A., and C.'s claim against B., are to be extinguished. If, as before, A. was not liable to B., he must nevertheless pay the note to C.; for C. confessedly has the legal title to the note, and having taken it in the course of business, holds it free from all equities in favor of A.¹ If, on the other hand, A. had no defense against B., his promise to C. is binding, although B. had a defense against C. C., however, will be a constructive trustee of the note for B., as in the case of the bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.

(2 a.) A. promises to C. pay him what B. owes C., for C.'s promise to release B. If B. had a defense against C., and so was not liable to him, A. by the terms of his promise is not liable to C. If, on the other hand, B. had no defense against C., but A. had a defense

¹ See *Eastern Co. v. Benedict*, 15 Gray, 289.

against B., A. must pay C. For C. having given up his claim against B. for A.'s promise to him, must be entitled to enforce it free from any equities in favor of A.¹

(2 b.) A. gives his note to C. upon the understanding that the debt of A. to B., and of B. to C., are to be cancelled. If, as before, B. was not liable to C., A. must nevertheless pay his note.² C. has the legal title to the note, and A., having obtained the release of his debt to B., has obviously no equitable defense. C., however, although he has the legal title to the note, must hold it, or its proceeds, when collected, in trust for B.; for the consideration having failed as between him and B., he would be unjustly enriching himself at B.'s expense, if he were allowed to retain the note for his own benefit. If, on the other hand, B. had no defense against C., but A. had a defense against B., A. must pay C. as in the case of the bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.³

Still another phase of novation has been the source of much controversy. If the debt of A. to B., or that of B. to C., was secured by a mortgage, or by the undertaking of a surety, will the benefit of the mortgage or the suretyship survive to C., after the extinguishment of the old debts and the creation of the new one of A. to C., in the absence of a specific agreement to that effect? C., it is submitted, should have the benefit of the mortgage in all cases but one; he should also be allowed to charge the surety where there is a *novatio nominis*, but not where there is a *novatio debiti*.

If A.'s debt to B. is secured by mortgage, and B. assigns his claim to C. without mention of the mortgage, C., it is everywhere agreed, is entitled in equity to the benefit of the security. A., not having paid the debt, cannot, of course, re-enter or call for a reconveyance; B., though holding the legal title of the mortgage, cannot hold it for himself, for he has transferred the claim to secure which it was given; the land mortgaged cannot remain locked up; equity, therefore, turns B. into a constructive trustee for the person who in natural justice is best entitled to it, that is, C., the assignee of the

¹ Edenfield v. Canady, 60 Ga. 456; Provencher v. Piper, 68 N. H. 31, 36 At. R. 552.

² Keller v. Beaty, 80 Ga. 815; Beaver v. Barlow, 9 Mass. 45; Adams v. Power, 48 Miss. 450; Abbott v. Johnson, 47 Wis. 239.

³ Deven v. Atkins, 40 Ga. 423; Gresham v. Morrow, 40 Ga. 457; Morris v. Whitmore, 27 Ind. 418.

claim. If C. now undertakes not to enforce this assigned claim of B. against A. in consideration of A.'s direct promise to pay him, there is no reason why the constructive trust in favor of C. should not continue. It is still true that A. has not performed the conditions entitling him to re-enter or call for a reconveyance. Although he cannot be sued upon the old debt, he has not *paid* it.

The result is the same, and for similar reasons, when without any assignment A. promises to pay C. what he owes B., in return for C.'s promise to release B., and at the same time makes a similar promise to B. for B.'s promise to release A. As before, A. is no longer liable on his old debt to B., but he has not *paid* that debt. A., therefore, cannot recover the legal title from B., nor can B. keep it for himself, having no longer the claim against A. He must, therefore, in justice hold the mortgage for C., who has, in effect, succeeded to B.'s claim against A.

If, again, the debt of B. to C. was secured by a mortgage, and A. promises to pay C. that debt, for C.'s promise not to sue B., C.'s right to the mortgage is still clearer.¹ B., though no longer liable to an action on the old debt to C., has not performed the condition of the mortgage by *payment*. C. is as much entitled to retain the mortgage as a mortgagee who cannot sue the mortgagor because the debt is barred by the Statute of Limitations.

But if, on the other hand, the debt of A. to B. was secured by mortgage, and A. promises to pay C., not that debt, but the unsecured debt of B. to C., the mortgage will not survive the novation. B., as before, having no right to sue A., cannot keep the mortgage for his own benefit. Nor is there any ground for making B. a constructive trustee for C. For in this case it is not C. who succeeds to B.'s secured claim against A., but A. who succeeds to B.'s unsecured duty to C. Since, then, neither B. nor C. is entitled to the mortgage, equity should treat it as extinguished.

If, finally, X. was a surety for A. to B., the substitution of A.'s liability to C. for his former liability to B. (*novatio nominis*) ought not to affect the liability of X. A.'s liability continues in substance the same as before, and X. is in no way prejudiced by a change of creditors. The case is, in effect, the same as if B. had assigned

¹ *Foster v. Paine*, 63 Iowa, 85; see also 74 Wis. 456. It is by the same principle that a change in the form of a debt secured by mortgage does not affect the mortgagee's right to the security. 1 Jones, *Mortgages*, 4th ed., § 924.

his claim against A. to C. C. would thus become *dominus* of the claim against A., and no one would assert that in such a case X. would be discharged.¹

But if X. was a surety for B. to C., and C. agrees to discharge B. in consideration of A.'s promise to pay B.'s debt to C. (*novatio debiti*), X., the surety, is also released; for it would be an utter perversion of X.'s contract to hold him as surety for A. when he in fact became surety for B. alone.

¹ Black v. De Camp, 78 Iowa, 718.

CAN A MURDERER ACQUIRE TITLE BY HIS CRIME AND KEEP IT?¹

"It is idle to say that the distinction between legal and equitable actions has been wiped out by modern practice. It is true that all actions must be commenced in the same way . . . and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out."

This statement of Mr. Justice Earl² as to the effect of the modern codes of procedure is supported by many similar observations by other judges,³ and its truth will hardly be questioned by any thoughtful lawyer. The codes have, however, wrought many changes in the old terminology, and have broken away from certain traditions, which served as a constant reminder of the distinction between law and equity. One who seeks equitable relief no longer begins a suit in equity, but an action, and, if successful, obtains not a decree but a judgment. The bill in equity and the declaration at law have both been replaced by the complaint, or, in some States, the petition. The defendant's pleading is never a plea, but an answer, regardless of the relief sought by the complainant. There are no more chancellors and common-law judges; courts of equity and common-law courts have disappeared, and there is no further issue of common-law reports and chancery reports. In their stead we have simply judges, courts of law, and law reports. These changes are commonly thought to have been beneficial. But with the disappearance of the old, every-day terms, which constantly suggested the difference between law and equity, there is danger that the distinction itself may be undervalued or over-

¹ Reprinted by permission from the American Law Register and Review for April, 1897.

² Gould v. Cayuga Bank, 86 N. Y. 75, 83.

³ See, for example, De Witt v. Hays, 2 Cal. 463, 469; Reubens v. Joel, 13 N. Y. 488, 493; Matthews v. McPherson, 65 N. C. 189, 191; Kahn v. Old Telegraph Co., 2 Utah, 174, 194; Bonesteel v. Bonesteel, 29 Wis. 245, 250.

looked. In truth, just because of this danger, it is even more important now than it was formerly to emphasize the true significance of the essential and permanent difference between legal and equitable relief. For the distinction between a judgment that the plaintiff recover land, chattels, or money, and a judgment that the defendant do or refrain from doing a certain thing, is as vital and far-reaching as ever. In other words, the courts still act sometimes *in rem*, as at common law, and sometimes *in personam*, as in equity.

An excellent illustration of the importance of discriminating between relief *in rem* and relief *in personam* is to be found in the arguments of counsel and the opinions of the judges in dealing with several recent cases, in which one person killed another in order to acquire, by descent or devise, the property of his victim. By a strange chance there have been seven of these cases reported in the last nine years. In four of them the murderer was successful in securing and holding the property; in two others his purpose was defeated, as it would have been in the remaining cases if the complaint had been properly drawn. But in all the cases, with one exception, even in those in which the right result is reached, the reasoning is in the highest degree unsatisfactory.

There are three possible views as to the legal effect of the murder upon the title to the property of the deceased:

1. The legal title does not pass to the murderer as heir or devisee.
2. The legal title passes to the murderer, and he may retain it in spite of his crime.
3. The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer.

Each of these views has been adopted in one or more of the cases. The first view was made the *ratio decidendi* in *Riggs v. Palmer*¹ (1889), in *Shellenberger v. Ransom*² (1891), and in *McKinnon v. Lundy*³ (1893-1895). In *Riggs v. Palmer* a lad of sixteen killed his grandfather to prevent the latter from revoking a will in which he was the principal devisee. The words of the New York Statute of Wills are: "No will in writing, except in the cases hereinafter

¹ 115 N. Y. 506.

² 31 Neb. 61.

³ 24 Ont. R. 132; 21 Ont. Ap. 560; 24 Can. S. C. R. 650.

mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. And there is no mention in the statute of the case of the murder of the testator by a beneficiary under the will. In *Shellenberger v. Ransom* a father murdered his daughter that he might inherit her lands, and, being arrested, conveyed his interest in the lands to his attorney to secure his services in defending him. By the Nebraska Statute of Descents: "When any person shall die seised of lands . . . they shall descend in the manner following . . . second . . . if he shall have no issue or widow his estate shall descend to his father."

It seems impossible to justify the reasoning of the court in these cases. In the case of the devise, if the legal title did not pass to the devisee, it must be because the testator's will was revoked by the crime of his grandson. But when the legislature has enacted that no will shall be revoked except in certain specified modes, by what right can the court declare a will revoked by some other mode? In the case of inheritance, surely, the court cannot lawfully say that the title does not descend, when the statute, the supreme law, says that it shall descend. It is not surprising, therefore, to find that both the New York and the Nebraska courts have abandoned their untenable position.

In *Ellerson v. Westcott*¹ (1896), it was said that *Riggs v. Palmer* must not be interpreted as deciding that the grandfather's will was revoked. On the contrary, the devise took effect and transferred the legal title to the grandson. But the court, acting as a court of equity, compelled the criminal to surrender his ill-gotten title to the other heirs of the deceased. In other words, the third of the three views before stated is now recognized as law in New York.

Upon a rehearing of *Shellenberger v. Ransom*,² the court pronounced their former opinion erroneous, and finally decided, adopting the second of the three views before stated, that the father and his grantee, although a purchaser with notice, acquired an indefea-

¹ 148 N. Y. 149.

² 41 Neb. 631. A short criticism of the reasoning in *Riggs v. Palmer* and *Shellenberger v. Ransom*, on the grounds more fully set forth in this article, appeared in 4 *Harvard Law Review*, 394. In a letter to the editors of that Review the counsel for the murderer in the Nebraska case said that his success in obtaining a rehearing was in large measure due to this criticism. Unfortunately the second opinion was more unsatisfactory than the first. For, although both disregarded legal principles, the first was against, while the second was in favor of the murderer.

sible title to the property of his murdered daughter. This second view was adopted also in *Owens v. Owens*¹ (1888), where a woman, an accessory before the fact to the murder of her husband, secured her dower; in *Deem v. Milliken*² (1892), where a son murdered his mother and inherited her property; and in *Carpenter's Estate*³ (1895), where a son inherited from his father whom he had killed. This view was approved also, extra-judicially, in *Holdom v. Ancient Order*⁴ (1896). In the light of these authorities the view that the legal title does not pass to the murderer as heir or devisee of his victim, being unsound in principle and unlikely to have any following in the future, may be dismissed from further consideration.⁵

The *res*, then, passing to the criminal, we have only to ask whether he may keep it in spite of his crime, or whether, because of his crime, he must surrender it to the other heirs of the deceased. If the first of these alternatives is the correct one, then is our law open to the reproach of permitting the flagrant injustice of an atrocious criminal enriching himself by his crime. If, on the other hand, the second alternative is adopted, it follows that the decisions in Nebraska, North Carolina, Ohio, and Pennsylvania are erroneous. To the writer it seems clear that these decisions are erroneous, and that the error is due to a failure to discriminate between legal

¹ 100 N. C. 240.

² 6 Ohio C. C. 357.

³ 170 Pa. 203. WILLIAMS, J., dissented, saying: "The son could not by his own felony acquire the property of his father and be protected by the law in the possession of the fruits of his crime."

⁴ 159 Ill. 619. See editorial comments to the same effect in the *American Law Register*, Vol. 34, N. S., p. 636; and in 29 C. L. J. 461; 32 C. L. J. 337; 34 C. L. J. 247; 39 C. L. J. 217; 41 C. L. J. 377. But the statement in 42 C. L. J. 133 of the later New York doctrine without adverse criticism is certainly noticeable.

⁵ As far back as the time of LORD HALE, in *King's Attorney v. Sands*, Freem. C. C. 129, Hardres, 405, 488, S. C., an authority not cited in any of the recent cases, it was taken for granted by counsel and court that the interest of a *cestui que trust* descended to his only brother, who had killed him. The brother being attainted of murder and therefore having no heirs, the trust was claimed by the Crown, as feudal lord. The claim was not allowed, as there was no escheat of equitable interests, but there being no one who could enforce the trust, the trustee, who was the father of the two brothers, held the legal title for his own benefit. By the civil law, too, as is pointed out by Mr. F. B. Williams, in 8 *Harvard Law Review*, 170-171, the legal title passed to the criminal and was afterwards taken from him.

Should the question arise again in Canada, it is highly probable that *McKinnon v. Lundy*, in which a husband killed his wife, who had made her will in his favor, would be supported on the ground that the husband became a constructive trustee for the heirs. The action, as in *Riggs v. Palmer*, was for equitable relief.

and equitable relief. Both counsel and court appear to have assumed that the only question before them was whether the criminal could take the title to the property of his victim — a purely common-law question. One and all overlooked that beneficent principle in our law by which equity, acting *in personam*, compels one who by misconduct has acquired a *res* at common law, to hold the *res* as a constructive trustee for the person wronged, or if he be dead, for his representatives. The true principle is put very clearly by ANDREWS, C. J., in *Ellerson v. Westcott*,¹ the latest decisions on the point under discussion: "The relief which may be obtained against her (the murderess and devisee) is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a civil right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution and deprive her of the use of the property."²

That there was no mention of this principle in the similar cases that preceded *Ellerson v. Westcott* is the more remarkable, because the distinction here insisted upon, that a person may acquire by force of the common law or by a statute a legal title, and yet be deprived of the beneficial interest in the property by reason of his unconscionable conduct in its acquisition, has been repeatedly recognized and enforced.

E. g., if a grantor has executed a deed, knowing its nature, the deed is effective to pass the title at law, even though he was induced to execute it by fraudulent representations of the grantee. Accordingly, the fraudulent grantee may, in the absence of a statute allowing equitable defenses, maintain ejectment against the grantor, the innocent victim of his fraud.³ But the right of the defrauded

¹ 148 N. Y. 149, 154.

² See the similar remarks of MACLENNAN, J. A., in *McKinnon v. Lundy*, 21 Ont. App. 560, 567: "One can easily understand that in the case of a murder committed with the very object of getting property of the deceased by will or intestacy, the court could defeat that object, even by taking away from the criminal a legal title acquired by such means; and it may be that the court would go further and take the legal title away, even though the crime were committed without that object."

This view finds further confirmation in the opinion of FRY, L. J., in *Cleaver v. Mut. Association*, '92, 1 Q. B. 147, 158. See also 4 Harv. L. Rev. 394; 25 Ir. L. Times, 423; 29 Ir. L. Times, 66; 91 L. Times, 261; 30 Am. L. Rev. 130; 6 Green Bag, 534.

³ *Feret v. Hill*, 15 C. B. 207; *Mordecai v. Tankersley*, 1 Ala. 100; *Thomas v. Thomas*, 1 Litt. (Ky.) 62; *Jackson v. Hills*, 8 Cow. 290; *Osterhout v. Shoemaker*, 3

grantor to relief in equity was recognized in several of the cases just cited, and also, notably, in *Blackwood v. Gregg*,¹ and it is, of course, every day's practice for a court of equity to treat a fraudulent grantor as a constructive trustee.

What is true of fraud is equally true of duress practised by the grantee upon the grantor. The grantee gets the legal title to the *res*, but equity gives the grantor a right *in personam*, and thus makes the grantee a trustee *ex maleficio*. But the grantor's right, being merely equitable, is lost, if the *res* is transferred to a *bona fide* purchaser.²

Fraud and force may be practised not only to procure the execution of a conveyance, but also to prevent the making of a conveyance. In such a case the unexecuted intention of the victim of the fraud or force must at common law count for nothing. The legal title must go just as it would if the owner of the *res* had never intended to convey it. But here, too, equity will see that the wrongdoer or any one claiming under him, except a purchaser for value without notice, does not profit by his wrong, and will compel him to convey the legal title in such manner as to effectuate the defeated intention of his victim. A clear and cogent authority upon this point is LORD THURLOW's decision in *Luttrell v. Olmuis*, which is thus stated by LORD ELDON, and with his approval, in 11 Ves. 638: "Lord Waltham, tenant in tail, meaning to suffer a recovery, and by will to give real interests to his wife, Mr. Luttrell, who by his marriage had an interest to prevent barring the entail, did by force and management prevent the testator from signing the deed to make the tenant to the *præcipe*: LORD THURLOW's opinion was clear, that though at law Mr. Luttrell's lady was tenant in tail, and, which makes it stronger, she was no party to the transaction, yet neither he nor any one else could have the benefit of that fraud, and the jury upon an issue directed, having found that the recovery was fraudulently prevented, LORD THURLOW held, even in favor of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it; and the estate was considered exactly as if a recovery had been suffered."³

Hill, 513; *Kahn v. Old Tel. Co.*, 2 Utah, 174; *Taylor v. King*, 6 Munf. 358; *Lombard v. Cowham*, 34 Wis. 486.

¹ *Hayes*, 277, 303-306.

² 9 Harv. L. Rev. 57, 58.

³ LORD ELDON, stating this case a second time in 14 Ves. 290, said: "Luttrell had,

LORD THURLOW applied the same principle in *Dixon v. Olmius*,¹ overruling the demurrer of Lord Waltham's heir, who, by several acts of fraud and violence, prevented the republication of his ancestor's will. This case, too, was approved by LORD ELDON,² who said in *Middleton v. Middleton*:³ "If a person be fraudulently prevented from doing an act, this court will consider it as if that act had been done, as in the case of Lord Waltham's will."

As an heir may by fraud or violence prevent the execution of a will, so a devisee may, by the same means, prevent the revocation of a will. The governing principle in such a case is admirably stated by BOYD, C. J., in *Gaines v. Gaines*:⁴ "A devisee, who by fraud or force prevents the revocation of a will, may, in a court of equity, be considered as a trustee for those who would be entitled to the estate in case it were revoked; but the question cannot with propriety be made in a case of this kind, where the application is to admit the will to record."⁴ The learned reader will at once appreciate the closeness of the analogy between these cases of fraud upon a testator or ancestor, and the cases where the testator or ancestor was killed. If the heir or devisee who gains the legal title by fraud must hold it as a constructive trustee, *a fortiori* should the same be true of one who acquires the legal title by a revolting crime.

But there are other instances where a legal title or right has been held to pass by force of a statute to a person notwithstanding his misconduct, but where a court of equity has defeated his unjust scheme by compelling him to surrender the *res* to the person wronged.

By Statute 7 Anne, c. 20, 91, all unregistered conveyances are to be adjudged fraudulent and void against subsequent purchasers for valuable consideration. In *Doe v. Alsopp*,⁵ a grantee who failed to

while Lord Waltham was upon his deathbed, engaged in suffering a recovery, prevented it, with the view that the estate should devolve upon the person with whom he was connected (his wife). That estate was by law vested in that individual, a much stronger case, therefore, than the acquisition of property through imposition. LORD THURLOW . . . had no doubt that it was against conscience that one person should hold a benefit which he had derived through the fraud of another."

¹ 1 Cox Eq. 414.

² 1 Jac. & W. 94, 96.

³ 2 A. K. Marsh. 191.

⁴ See to the same effect, *Graham v. Burch*, 53 Minn. 17 (*semble*); *Blanchard v. Blanchard*, 32 Vt. 62 (*semble*); 2 Roberts, Wills, 3d ed., 31. The decision to the contrary in *Kent v. Mahaffy*, 10 Ohio St. 204, it is submitted, is not to be supported. In *Clingan v. Mitcheltree*, 31 Pa. 25, the equitable aspect of the question was not discussed.

⁵ 5 B. & Al. 142.

register his deed was defendant in an ejectment brought by a second grantee who bought with notice of the prior unregistered conveyance. It was argued for the defendant that the object of the statute was to protect innocent purchasers only, and the court was asked to read into the statute an exception excluding from its operation those who sought to derive from it an unconscionable advantage. But the judges declined to legislate, saying that plainer words could not be used and that sitting in a court of law they were to give effect to them, and suggesting that the defendant's relief must be sought in equity. And courts of equity have regularly given relief in such cases by treating the second grantee as a constructive trustee for the first.¹

In *Greaves v. Tofield*,² JAMES, L. J., says: "LORD ELDON pointed out that there was no altering the language of the Acts of Parliament, there was no dealing with or in any way repealing the Acts of Parliament directly or indirectly, but giving the acts their full force, that is to say, leaving the estate to go in priority to the man who had registered, still if that man had notice of anything by which his vendor or his grantor had bound himself, he was bound by it."³

Again by Mo. Rev. St. § 2689, "The homestead of every housekeeper shall be exempt from attachment and execution." In the singular case of *Fox v. Hubbard*,⁴ a decree had been made for a sale under foreclosure of a mortgage covering a house and land; before the sale the house was wrongfully removed to an adjoining lot by the owner of the lot, who at once set up housekeeping in the house. The purchaser at the foreclosure sale bought in ignorance of the removal of the house. The house, of course, could not be recovered in specie, for it had become a part of the wrongdoer's realty. It was conceded that the purchaser had an action of tort against the wrongdoer, but the latter was insolvent and insisted on his statutory homestead exemption in his new home. Accordingly, as the court stated, there was no remedy for the purchaser at law. An exception could not be added to the statute, even against a tort-feasor. But giving full effect to the statute, the court decreed that the wrongdoer must

¹ *Le Neve v. Le Neve*, 1 Ves. 64, Amb. 436, 3 Atk. 646, s. c., approved by LORD ELDON, in *Davis v. Strathmore*, 16 Ves. 416, 427.

² 14 Ch. Div. 563.

³ See also 1 Pomeroy, Eq. Jur., §§ 430, 431; 2 W. & T. L. C. in Eq., Am. ed., 214; Britton's App., 45 Pa. 172.

⁴ 79 Mo. 390.

hold the homestead subject to a lien in equity to the extent of the value of the house removed.

Another illustration is suggested by *Vane v. Vane*.¹ The plaintiff was the true owner of certain land, but was led by the fraudulent representations of the defendant to suppose that he was not the owner, and accordingly suffered the defendant to occupy adversely for more than twenty years. This adverse possession cut off the plaintiff's right of entry and action, and by force of the statute, vested the title in the adverse possessor. But the defendant, because of the fraud in securing his statutory title, was required by equity to reconvey the property to the plaintiff. This decision, it should be said, was made under Section 26 of the Statute 3 & 4 Wm. IV. c. 27, which expressly authorized a bill in equity in such a case. But there seems to be no reason why a court of equity might not accomplish the same result without an express statutory provision. Suppose, for example, that the defendant surreptitiously took the plaintiff's watch, and has concealed his possession of it from the owner for six years. By force of the statute the defendant's possession is unassailable at common law, and the wrongful possessor has now become the legal owner.² But why may not equity treat him as a trustee? If he had gained the legal title by fraudulently inducing the plaintiff to transfer it to him, he would clearly be a trustee for the plaintiff. What difference can it make to a court of equity whether the legal title came to the defendant through the act of the plaintiff, or by operation of law, if in each case he acquired it as the direct consequence of his fraud.³

These illustrations, drawn from the misuse of the Statute of Limitations, the Homestead Exemption Statute and the Recording Acts, and from the use of fraud or duress against an ancestor or testator, are obviously governed by the common principle that one shall not

¹ 8 Ch. 383.

² 3 Harv. L. Rev. 321, 322.

³ There are many conflicting decisions upon the question whether a fraudulent concealment of a cause of action in contract or tort for damages, will suspend the running of the Statute of Limitations. This conflict is surprising, in view of the explicit words of the Statute: "No action shall be brought unless within six (or other fixed number of) years." But here, too, though the right on the old cause of action at law is barred, equity might well give relief. By fraudulently barring the plaintiff's action, the defendant would unjustly enrich himself by keeping for himself what he ought to have paid to the plaintiff. A court of equity should not hesitate to make the defendant surrender this unjust enrichment to the plaintiff. The case would seem to fall within the general principle of quasi-contracts.

be allowed "to enjoy the fruits of his iniquity." Surely murder is iniquity within this principle. Every one must agree with the following statement of FRY, L. J., in *Cleaver v. Mutual Association*:¹ "It appears to me that no system of jurisprudence can with reason include amongst the rights, which it enforces, rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor."

The case from which the remarks of the distinguished Lord Justice are taken, while resembling the American cases where a murderer sought to profit by his crime, suggests certain distinctions. The facts of the case were these: James Maybrick had insured his life in favor of Florence Maybrick, his wife. Mrs. Maybrick was afterwards convicted of the murder of her husband, but the sentence of death was commuted to penal servitude for life. The insurance money was claimed by Mrs. Maybrick's assignee and also by the executors of James Maybrick. The insurance company insisted that the policy was not enforceable by either claimant. Under St. 45 & 46 Vict. c. 75, § 11, James Maybrick was made a trustee of the policy for his wife. But this statute also provided that the moneys payable under the policy should not, "so long as any object of the trust remains unperformed, form part of the estate of the insured." The wife, therefore, was not the sole *cestui que trust* of the policy. As the court said, it was a necessary implication, that, if the wife died before her husband, the insurance money would form part of his estate. The court decided, first, that it was against public policy for Mrs. Maybrick, or her assignee, to enforce the trust because of her crime; and secondly, that under the statute the result must be the same whether the performance of the trust for the wife was rendered impossible by her premature death or by public policy. In either case the contingent resulting trust in favor of the insured took effect, and therefore the executors of James Maybrick were entitled to the moneys payable under the policy.

The judges intimated that their decision would have been the same, even in the absence of any statute. Mrs. Maybrick would not then have been a *cestui que trust* of the policy, nor, as payee in a contract between the insurer and the insured, would she have had any valid

¹ 1892, 1 Q. B. 147.

claim under the policy. For, by the English law, only the promisee has rights under a contract, even though it purports to be for the benefit of a third person. In many of the States in this country, on the other hand, the interest in a life-insurance policy is vested exclusively and irrevocably in the beneficiary, passing to his representative, if he die in the lifetime of the insured, and enforceable by the beneficiary or his representative by an action at law. How, in one of these States, are the rights of the parties to be adjusted, if the beneficiary killed the insured? The criminal beneficiary would, doubtless, be precluded from recovering the insurance money by the same principle of public policy that defeated the claim of Mrs. Maybrick. On the other hand, it is difficult to find any warrant for saying that the amount of the policy forms part of the estate of the insured. The latter has no contingent resulting interest in the policy. The interest of the beneficiary may have arisen by the gift of the insured, but the gift was complete and irrevocable, and the conclusion seems inevitable that the insurer is relieved of all liability.

The necessity of a similar conclusion will be more apparent in another case that may be put. The payee of a negotiable note, payable ten days after the death of the maker's father, indorses it to A. for value. The indorsee kills the father. As before, public policy prevents a recovery by the criminal against the maker or indorser. And surely the payee, who has already had the value of the note from the indorsee, cannot receive it again from the maker. The latter profits, not by any merit of his own, but, as obligors frequently profit, by the application of the maxim *Ex turpi causa non oritur actio*.

With the instances just considered may be contrasted another possible case, suggested by LORD JUSTICE FRY's opinion in the Maybrick case. Suppose land is sold to B. and C., and the conveyance made to B. for life, with remainder in fee to C. C. kills B. How will the murder affect the rights of the parties in the property? B.'s life estate being terminated by his death, C. becomes at law the absolute owner of the land. Will equity make him hold his fee simple as a constructive trustee? If so, for whom? Certainly not for the seller, for he, having received the price of the land, has no concern with its subsequent history. Nor should C. be made a constructive trustee of the entire estate for the benefit of B.; for that would

make C. forfeit his remainder which he acquired independently of his crime. It is not the function of equity to administer the penal law, but to secure restitution to a person wronged, by compelling the wrongdoer to give up the profits of his misconduct. In the case supposed, C. took from B. no more than the enjoyment of the estate during the years he might have lived but for C.'s crime. This, being the measure of C.'s unjust enrichment, should also be the extent of the constructive trust against him. Perfect restitution in such a case is obviously impossible, both because B. is dead and because it is impossible to know how long he would have lived. We must be content with the closest possible approximation to complete justice. As restitution cannot be made to B., it must be made to him who, in matters of property, stands in his place — that is, his heir. And the amount of the restitution must be determined by estimating, according to the tables of mortality, how many years a person of B.'s age would probably have lived. For the period thus ascertained equity would require C. to hold the land as a constructive trustee for B.'s heir.

Similar reasoning would be applicable if land bought by B. and C. had been conveyed to them as joint tenants in fee simple, and C. were then to murder B. Each joint tenant has a vested interest in a moiety of the land so long as he lives, and a contingent right to the whole upon surviving his fellow. The vested interest of C., the murderer, cannot be taken from him even by a court of equity. But C. having by his crime taken away B.'s vested interest must hold that as a constructive trustee for the heir of B.; and, it being impossible to know which of the two would have outlived the other, equity would doubtless give the innocent victim the benefit of the doubt, as against the wrongdoer who had deprived him of his chance of survivorship, and accordingly give the entire equitable interest to B.'s heir upon C.'s death.

The results reached in these cases must commend themselves to every one's sense of justice. But all will admit that these results could not be accomplished by common-law principles alone. The common law would make the criminal remainderman in the one case, and the criminal joint tenant in the other case, the absolute owner of the land. Equity alone, by acting *in personam*, can compel the criminal to surrender what, in spite of his crime, the common law has suffered him to acquire. It is much to be regretted that

counsel did not invoke, and the courts of Nebraska, North Carolina, Ohio, and Pennsylvania did not apply, in the cases recently before them, the sound principle of equity, that a murderer or other wrong-doer shall not enrich himself by his iniquity at the expense of an innocent person.

TWO THEORIES OF CONSIDERATION.¹

I. UNILATERAL CONTRACTS.

CONSIDERATION, according to the traditional definition, is either a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. The simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient *assumpsit* in its primitive form of an action for damage to a promisee by a deceitful promisor. In one respect only does the definition leave anything to desire. What is to be understood by detriment?

The incurring of a detriment by the promisee involves of necessity a change of position on his part; there must be some act or some forbearance by him. But will every act or every forbearance be a detriment, or must the word be restricted to certain acts and forbearances? It is certainly a common opinion that the word is to be interpreted in the restricted sense and cannot properly include an act or forbearance already due from the promisee by reason of some pre-existing legal obligation. The inability of the writer to reconcile this opinion with the decided cases has led him to give to detriment its widest interpretation and to define consideration as any act or forbearance or promise,² by one person given in exchange for the promise of another.

These two views may be tested by the consequences of their application to the following three classes of acts or forbearances: I. Forbearance to prosecute a groundless claim. II. Performance of a pre-existing contractual duty to a person other than the prom-

¹ Reprinted by permission from the *Harvard Law Review* for April and May, 1899, with manuscript additions by the author.

² A promise is an act; but to prevent possible misapprehension it seems expedient to add the word "promise" in the definition.

isor. III. Performance of a pre-existing contractual duty to the promisor himself.

Before discussing these cases, however, it is important to emphasize the fact that a promise, though given for an abundant consideration, may yet be unenforceable. This is true whether detriment be taken in the wider or the narrower sense of the word. An illustration will make this clear. An unscrupulous friend of the defendant in a criminal trial promises a juror a certain amount of money in consideration of his voting to the end for acquittal. The juror does so vote. Here we have a promise for what is unquestionably a detriment to the promisee. But obviously the juror has no legal remedy on his bargain. He will fail, however, not because he has given no consideration for the promise, but because public policy forbids the enforcement of so vicious a bargain. This distinction is brought out pointedly in several cases where the act forming the consideration for the promise was a tort. The promisee in these cases was a sheriff who, acting upon a creditor's promise of indemnity, seized goods which he had no right to seize. In all of them he was made to pay damages to the person injured, and in all of them, having acted in good faith, he was allowed to recover on the contract of indemnity.¹ Had he known that he was committing a tort, he would unquestionably have failed to get reimbursement from the creditor. The consideration, however, would have been precisely the same in both cases. But the public policy was on his side in the one case and would be against him in the other.

As public policy may destroy the value of a contract where the consideration is an act, so it may have the same effect where the

¹ *Arundel v. Gardiner*, Cro. Jac. 652; *Elliston v. Berryman*, 15 Q. B. 205; *Robertson v. Broadfoot*, 11 Up. Can. Q. B. 407. In *Fletcher v. Harcot*, Winch, 48, Hutt. 55 s. c., an innkeeper, at the request of an officer and upon the latter's promise of indemnity, kept in custody at his inn for a day and a night a man whom the officer had arrested. It turned out that the prisoner had been wrongfully taken by the officer, and the innkeeper, having been compelled to pay damages for the false imprisonment in his inn, recovered judgment against the officer on his promise, because, as *HOBART, C. J.*, and *HUTTON and WINCH, JJ.*, said: "Be the imprisonment lawful or unlawful, he (the innkeeper) might not take notice of that. As if I request another man to enter into another man's ground and in my name to drive out the beasts and impound them and promise to save him harmless, this is a good assumpsit, and yet the act is tortious; but by *HUTTON*, where the act appears in itself to be unlawful, there it is otherwise, as if I request you to beat another and promise to save you harmless, this assumpsit is not good, for the act appears in itself to be unlawful."

consideration is a forbearance. One who is induced to refrain from a contemplated murder or other crime by the promise of money, renounces his freedom of action and gives the promisor precisely what he wanted in return for his promise. There is, therefore, a bargain. But it is obviously against the public good to permit one to obtain a right of action solely as a reward for abstaining from the commission of a crime. The same reasoning is applicable to cases where the promisee is induced to refrain from grossly immoral though not criminal acts, or where he forbears, in return for a promise, to commit what he knows to be a tort.¹ In all these cases of forbearance just mentioned, those who interpret detriment in the restricted sense would say that the forbearance was legally due from the promisee independently of the promise, and that the promisee must fail because there was no consideration for the promise. But inasmuch as the same result is reached whether it be said that the forbearance is no consideration, or that the forbearance is a consideration but the bargain inoperative on grounds of public policy, we need not consider these cases further, but pass at once to those instances where the decision must vary accordingly as one or the other of the two theories of detriment is adopted.

I. Forbearance to prosecute a groundless claim.

A line of decisions² extending over nearly three centuries seemed to have established firmly in our law the doctrine that forbearance to sue upon an unfounded claim would never support a promise given therefor; that the promisee's belief in the validity of his claim as well as the fact that the claim was fairly doubtful in law or fact were alike irrelevant circumstances. There is surely no objection on the score of public policy to the enforcement of a promise obtained by a promisee in return for his forbearance to sue upon a

¹ *Cowper v. Green*, 7 M. & W. 633; *Cochrane v. Willis*, 34 Beav. 359; *McCaleb v. Price*, 12 Ala. 753; *Worthen v. Thompson*, 54 Ark. 151; *Bruton v. Wooton*, 15 Ga. 570; *Smith v. Bruff*, 75 Ind. 412; *Botkin v. Livingston*, 21 Kas. 232; *Wendover v. Pratt*, 121 Mo. 273; *Swaggard v. Hancock*, 25 Mo. Ap. 596; *Crosby v. Wood*, 6 N. Y. 369; *Tolhurst v. Powers*, 133 N. Y. 460; *Cleveland v. Lenze*, 27 Oh. St. 383. But see *contra* *Pool v. Clipson, Shepp. Faithful Counsellor*, 2d ed., 131.

² *Lord Gray's Case* (1566), 1 Roll. Abr. 28, pl. 57; *Stone v. Wythipool* (1588), Cro. El. 126; *Tooley v. Windham* (1590), Cro. El. 206; *Smith v. Jones* (1610), Yelv. 184; *Rosyer v. Langdale* (1650), Sty. 248; *Hunt v. Swain* (1665), T. Ray. 127; *Barber v. Fox* (1670), 2 Wms. Saund. 136; *Loyd v. Lee* (1718), 1 Stra. 94; *Jones v. Ashburnham* (1804), 4 East, 455; *Edwards v. Baugh* (1843), 11 M. & W. 641.

fairly doubtful or a *bona fide* claim. It follows, therefore, that the line of decisions just mentioned can be supported only on the theory that forbearance to prosecute an invalid claim is not a detriment. And the cases were in fact decided upon this principle. This view is clearly stated by TINDAL, C. J., in *Wade v. Simeon*:¹ "Detrimental to the plaintiff it [forbearance] cannot be if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defense upon such an admitted state of facts must be successful, and the defendant will recover costs; which must be assumed to be a full compensation for all legal damage he may sustain."

But this seemingly inveterate doctrine has been overruled. Since the case of *Longridge v. Dorville*,² decided in 1821, it has been generally agreed that forbearance to enforce a claim that might reasonably be thought doubtful will support a promise, although the claim be really invalid.³ In *Callisher v. Bischoffsheim*⁴ it was decided in accordance with opinions expressed in *Cook v. Wright*,⁵ that a promise in consideration of forbearance of an invalid claim was binding unless the claim was made *mala fide*. This decision, though criticised by BRETT, L. J., in *Ex parte Banner*,⁶ has been approved and followed in subsequent cases.⁷ The late English cases have been cited with approval in several recent American cases.⁸ The modern English rule accords so well with the views of business men, that it can hardly fail of general adoption in this country.⁹

¹ 2 C. B. 548, 564. See the similar statement by MAULE, J., page 566.

² 5 B. & Ald. 117.

³ *Keenan v. Handley*, 2 D. J. & S. 283; *Wilby v. Elgee*, L. R. 10 C. P. 497. Many American decisions to the same effect are cited in Professor Williston's note to 1 *Pars. Cont.*, 8th ed., 458.

⁴ L. R. 5 Q. B. 449.

⁵ 1 B. & S. 559.

⁶ 17 Ch. D. 480, 490.

⁷ *Ockford v. Barelli*, 25 L. T. Rep. 504; *Kingsford v. Oxenden*, 7 Times L. R. 13, 565 (C. A.); *Miles v. New Zealand Co.*, 32 Ch. Div. 266.

⁸ *Prout v. Pittsfield District*, 154 Mass. 450; *Grandin v. Grandin*, 49 N. J. L. 508; *Rue v. Meirs*, 43 N. J. Eq. 377; *Wahl v. Barnum*, 116 N. Y. 87; *Hewett v. Currier*, 63 Wis. 386.

⁹ The following cases in addition to those already cited, support the doctrine of *Callisher v. Bischoffsheim*. *Union Bank v. Geary*, 5 Pet. 99; *Morris v. Munroe*, 30 Ga. 630; *Hayes v. Mass. Co.*, 125 Ill. 626, 639; *Ostrander v. Scott*, 161 Ill. 339; *Leeson v. Anderson*, 99 Mich. 247, 248; *Hanson v. Garr*, 63 Minn. 94; *Di Iorio v. Di Brasio*, 21 R. I. 208. There are a few recent decisions to the contrary: *Sweitzer v. Heasley*, 13 Indiana Ap. 567; *Peterson v. Breitag*, 88 Iowa, 418, 422, 423; *Emmittsburg v. Donoghue*, 67 Md. 383. Other earlier decisions will be found in 1 *Pars. Cont.*, 8th ed., 458 n.

In the light of this change in the law it can no longer be maintained that forbearance to prosecute a groundless claim is not a detriment. And as the validity of a promise given for such forbearance depends upon the good faith of the promisee, that is, upon public policy, the forbearance cases support the writer's view that consideration is any act or forbearance by one person given in exchange for the promise of another.

II. Performance of a pre-existing contractual¹ duty to a person other than the promisor.

As early as 1616 it was decided in *Bagge v. Slade*,² that an action would lie upon a promise, the only consideration for which was the performance of a prior contract with a third person.

A bond executed by a principal and by A. and B. as sureties being forfeited, B. requested A. to pay the whole debt to the obligee promising to pay him a moiety. A. paid accordingly and brought assumpsit against B. for refusing to keep his promise. It was objected that there was no consideration for the promise, since A. was already bound to the obligee for the full amount of the bond. But the court gave judgment for A., COKE, C. J., saying: "I have never seen it otherwise but when one draws money from another, that this should be a good consideration to raise a promise." In considering this case it should be remembered that in the absence of an express contract there was at this time no right of contribution for a surety either at law or in equity.³ *Moore v. Bray*⁴ was a similar case, decided in the same way, in 1633. An anonymous case of 1631 is thus reported in *Sheppard's Action on the Case*:⁵

¹ Promises given in consideration of the performance of official duties, or duties to the public, are not enforceable. Public policy, rather than the absence of consideration, it is submitted, is the sound reason for denying a right of action on such promises. But, the result being the same on either view, they fall without the scope of this article. The authorities are well collected in the note to 1 *Parsons, Cont.*, 8th ed., 452. See also *Willis v. Peckham*, 1 Br. & B. 515 (duty of witness to attend court); *Crowhurst v. Laverack*, 8 Ex. 208 (duty of mother to support illegitimate child); *Keith v. Miles*, 39 Miss. 442 (duty of ward to obey guardian), and especially *Leake, Cont.*, 2d ed., 99.

² 3 Bulst. 162, 1 Roll. R. 354, s. c.

³ In *Wormleighton v. Hunter* (1613), Godb. 243, a surety having exhibited an English bill in the Court of Requests praying for contribution, the Common Pleas granted a prohibition, saying: "If one surety should have contribution against the other, it would be a great cause of suits."

⁴ 1 Vin. Abr. 310, pl. 31; but see *Westbie v. Cockayne* (1631), 1 Vin. Abr. 312, pl. 36, *contra*.

⁵ 2d ed., 155-156.

"If A. owe to B. twenty pounds and C. say to A. pay him his twenty pounds and I will pay it to you again, this is a good consideration and promise. Adjudged."¹

These early precedents seem to have been forgotten. But the question involved in them arose in the Common Pleas in 1860, in the Exchequer in 1861, and in the Queen's Bench in 1866; and in all three cases the plaintiff was successful.² One may safely assert, therefore, that by the law of England the performance of a contract with a third party is a consideration for a promise. It is obviously impossible to reconcile this rule of law with the restricted interpretation of detriment as an act or forbearance other than the fulfilment of a legal duty.³ But here again all difficulty disappears if we take detriment in the wider sense of any change of position, that is, any act or forbearance given in exchange for a promise.

It must be conceded that in this country a majority of the decisions and *dicta* are opposed to the doctrine of *Shadwell v. Shadwell*, *Scotson v. Pegg*, and *Chichester v. Cobb*.⁴ But in most of them the English cases were not brought to the attention of the court. And it is certainly a significant fact that the latest decisions show a marked tendency towards the English rule.⁵ The decision of the Massachusetts court is all the more valuable because given in the

¹ Shepp. Faithful Counselor, (2d ed.) 131.

² *Shadwell v. Shadwell*, 9 C. B. N. S. 159; *Scotson v. Pegg*, 6 H. & N. 295; *Chichester v. Cobb*, 14 L. T. Rep. 433. See also *Skeete v. Silverburg*, 11 Times L. R. 491. But see *dicta* to the contrary in *Jones v. Waite*, 5 Bing. N. C. 341.

³ The cases on this point have proved very troublesome to text-writers. *Anson*, Cont., 8th ed., 91, 92; *Pollock*, Cont., 6th ed., 175-177; *Langdell*, Summary of Cont., § 54.

⁴ *Johnson v. Seller*, 33 Ala. 265 (*semble*); *Havana Co. v. Ashurst*, 148 Ill. 115, 136 (*semble*); *Peetman v. Peetman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Andrews*, 42 Ind. 7; *Harris v. Cassady*, 107 Ind. 156; *Beaver v. Fulp*, 136 Ind. 595; *Schuler v. Myton*, 48 Kan. 282; *Holloway v. Rudy* (Ky. 1901), 60 S. W. 650; *Putnam v. Woodberry*, 68 Me. 58; *Gordon v. Gordon* 56 N. H. 170, 173 (*semble*); *Ecker v. McAllister*, 45 Md. 290; 54 Md. 362, s. c.; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *Arend v. Smith*, 151 N. Y. 502; *Allen v. Turck*, 8 N. Y. App. Div. 50; *Hanks v. Barron*, 95 Tenn. 275; *Davenport v. Congregational Society*, 33 Wis. 387.

⁵ *Champlain Co. v. O'Brien*, 117 Fed. R. 271; *Humes v. Decatur Co.*, 98 Ala. 461, 473 (*semble*); *Donnelly v. Newbold*, 94 Md. 220; *Abbott v. Doane*, 163 Mass. 433; *Monnahan v. Judd*, 165 Mass. 93, 100 (*semble*); *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. Rep. 308 (*semble*); *Day v. Gardner*, 42 N. J. Eq. 199, 203 (*semble*); *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77, 53 At. R. 49; *Green v. Kelley*, 64 Vt. 309; see also *Grant v. Duluth Co.*, 61 Minn. 395, 398.

light of the authorities on both sides of the question. It would not be surprising, if ultimately a considerable majority of the American courts, not already fettered by their own precedents, should adopt the English and Massachusetts rule, which has the great merit of not hampering, by a technicality, freedom of contract.

III. Performance of a pre-existing contractual duty to the promisor himself.

The question, whether a promise is enforceable where the promisor gets for it only what the promisee was already bound by contract to give him, has generally arisen in cases where a part of the amount due has been given and received in satisfaction of a debt. The ruling of the courts is well-nigh universal that, notwithstanding the partial payment upon such terms, the creditor may recover the rest of the debt. As the rule is commonly expressed, the payment of a part of a debt cannot be a satisfaction of the whole. And the rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration and is simply the survival of a bit of formal logic of the mediæval lawyers.

The earliest allusion to the effect of a partial payment in satisfaction of a debt that the writer has found is the remark of DANVERS, J., in 1455;¹ and he, strange to say, thought the part payment should be effective: "Where one has *quid pro quo*, there it shall be adjudged a satisfaction. As if one be indebted to me in 40 pounds and I take from him 12d. in satisfaction of the 40 pounds, in this case I shall be barred of the remainder." Forty years later,² FINEUX, J., expressed a similar opinion. "I think there is no difference between accord and satisfaction in money and in a horse. For notwithstanding the sum is less than that in demand, still when the creditor has received it by his own agreement it is as good a satisfaction to him as anything else." But BRIAN, C. J., said in the same case: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand. And notwithstanding the horse may be worth only

¹ Y. B. 33 Hen. VI. f. 48, A, pl. 32.

² Y. B. 10 Hen. VII. f. 4, pl. 4.

a penny, that is not material, for it is not apparent." Perkins in his *Profitable Book*,¹ first published in 1532, agreed with DANVERS and FINEUX: "If a man be bounden in 100 pounds to pay 100 marks unto the obligee, and the obligee accept of 10 pounds of the obligor in satisfaction of 100 marks, it is a good performance of the condition; and yet some have said the contrary, because 10 pounds cannot be satisfaction of 100 marks. But that is not material in his case because the obligee is content therewith." But this protest was powerless against the logic of BRIAN. In 1561 all the judges agreed that "the payment of 20 pounds cannot be a satisfaction for 100 pounds."² In 1602 came COKE's celebrated dictum in *Pinnel's case*:³ "Resolved by the whole Court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of a parcel can be a satisfaction to the plaintiff."⁴ The same reasoning occurs in the *Commentary on Littleton*:⁵ "because it is apparent that a lesser sum of money cannot be a satisfaction of a greater."

As the learned reader will have observed, there is no allusion in any of these remarks of the judges to the consideration for an *assumpsit*. The word consideration, in its modern sense, was unknown to BRIAN, and the action of *assumpsit* itself was, in his day, in the embryonic stage. To his mind whether 10 pounds could be a satisfaction of 20 pounds was a question of simple arithmetic which admitted of only one answer. Ten cannot be twenty, the part cannot be the whole. COKE was presumably familiar with

¹ F. 141 of edition of 1545; § 749 of edition of 1757.

² Note, Dal. 49, pl. 13. To the same effect Anon. (1588), 4 Leon. 81, pl. 172, "*per curiam*, 5 pounds cannot be a satisfaction for 10 pounds."

³ 5 Rep. 117 a; Moo. 677, pl. 923, s. c.

⁴ In the report of the same case in Moore it is said: "But payment of part at the day and place cannot be, though accepted, satisfaction of the whole of the same kind." See also *Goring v. Goring* (1602), Yelv. 11.

⁵ 212 b.

BRIAN's statement. At all events he reasoned in precisely the same axiomatic way: "It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater." It is sufficiently obvious from the similarity of the language of COKE and BRIAN that it never occurred to the former that the resolution in *Pinnel's* case was based upon any doctrine of consideration. But, fortunately, COKE's opinion is not a mere matter of inference. We have his own explicit statement, discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In *Bagge v. Slade*¹ he said: "If a man be bound to another by a bill in 1000 pounds and he pays unto him 500 pounds in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1000 pounds, this 500 pounds is no satisfaction of the 1000 pounds, but yet this is good and sufficient to make a good promise and upon a good consideration because he has paid money, 500 pounds, and he hath no remedy for this again." In 1639 the obligor recovered judgment upon a promise like that in the case put by COKE, the court saying: "For though legally, after the obligation is forfeited, 30 pounds can be no satisfaction for 60 pounds, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise."² There are several other cases where payment of part of what was due was adjudged a sufficient consideration to support a promise to deliver up the obligation.³ There are also cases in which payment of the whole was deemed a consideration for a similar promise.⁴

¹ 3 Bulst. 162, 1 Roll. R. 354, Jenk. Cent. Cas. 324, pl. 38, Harv. Ms. R. temp. 14 James I., 2, s. c.

² *Rawlins v. Lockey* (1639), 1 Vin. Abr. 308, pl. 24.

³ *Reynolds v. Pinhowe* (1595), Cro. El. 429, 1 Roll. Abr. 28, pl. 54, Moo. 412, s. c.; "Because speedy payment excuses and prevents labour and expense of suit"; *Anon.* (1598), 1 Roll. Abr. 27, pl. 53, per POPHAM, C. J. *Johnson v. Astill* (1667), 1 Lev. 198, 2 Keb. 155, s. c.: "By the Court. Payment without suit or trouble of that which is due is a good consideration." See also the opinion of LITLEDAL, J., to the same effect in *Wilkinson v. Byers*, 1 A. & E. 106.

⁴ *Cook v. Huet* (1581), 1 Leon. 238, pl. 317 (cited), Cro. El. 194 (cited), s. c.; *Anon.*, Hutt. 101 (cited); *Flight v. Crasden* (1625), Cro. Car. 8, Hutt. 76, s. c.: "It is consideration sufficient to have it paid without suit or trouble." *Anon.* (1675), 1 Vent. 258: "Payment of a debt without suit is a good consideration."

Dixon v. Adams (1596), Cro. El. 538, Moo. 710, s. c., is *contra*, but, so far as the writer has discovered, is the only reported English decision, prior to *Foakes v. Beer*, in which the plaintiff failed in an action upon a promise given in considera-

In *Morris v. Badger*¹ it was decided, in 1621, that payment by a surety would support a promise by the creditor to sue the principal and hold the amount recovered for the benefit of the surety. In *Hubbard v. Farrer*,² decided in 1635, a promise by an obligee, in consideration of payment of less than the amount due by the principal obligor, not to sue the surety, was held to be a valid contract, "for it is a good consideration for the obligee to have money in his purse, it being before only a chose in action."

The subsequent history of the mediæval doctrine, that a partial payment of a debt cannot be a satisfaction of the whole amount due, although so intended by the parties, is soon told. In *Cumber v. Wane*,³ in 1721, the defendant pleaded to an action of *indebitatus assumpsit* that his own negotiable note for five pounds had been given and received in satisfaction of the debt. The plaintiff objected that the plea was ill, "it appearing that the note for 5 pounds could not be a satisfaction for 15 pounds. . . . Even the actual payment of 5 pounds would not do, because it is a less sum. Much less shall a note payable at a future day." This argument prevailed. PRATT, C. J., said: "We are all of opinion that the plea is not good. . . . If 5 pounds be (as is admitted) no satisfaction for 15 pounds, why is a simple contract to pay 5 pounds a satisfaction for another simple contract for three times the value?" The next judicial allusion to the doctrine appears to be a *dictum* of BULLER, J., in 1798: "Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not I do not know. It was formerly considered that it could not, and was so decided in COKE. I think, however, there are some late cases to the contrary, and one in particular in LORD MANSFIELD's time, who said that, if a party chose to take a smaller sum, why should he not do it? There may be circumstances under which such an agreement might not only be fair, but advantageous."⁴ But this *dictum* has had no effect. Six years later the old

tion of the payment of money due. There are *dicta* to the same effect in *Richards v. Bartlett* (1582), 1 Leon. 19; *Greenleaf v. Barker* (1596), Cro. El. 193.

¹ Palm. 168; Harv. Ms. Rep. Temp. 2-22 James I., f. 181, pl. 6, s. c.

² 1 Vin. Abr. 306, pl. 17.

³ 1 Stra. 426. *Cumber v. Wane*, though clearly coming within the reasoning of *BRIAN* and *COKE* (see also *Geang v. Swaine*, 1 Lutw. 464, 466), and approved in *Fitch v. Sutton*, 5 East, 230, 232, and *Thomas v. Heathorn*, 2 B. & C. 477, 481, was overruled in *Sibree v. Tripp*, 15 M. & W. 23.

⁴ *Stock v. Mawson*, 1 B. & P. 286, 290.

rule was reasserted in *Fitch v. Sutton*.¹ LORD ELLENBOROUGH, unaware of the true origin of the rule and unacquainted with *Bagge v. Slade* and the kindred cases of the seventeenth century, put forward the novel view that the rule was based upon the doctrine of consideration. "There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement by LORD ELLENBOROUGH, false gloss though it be, has been generally followed by the courts, and is responsible for the greater part of the objectionable applications of the doctrine of consideration, whereby the reasonable expectations of business men have been disappointed.

But notwithstanding its general acceptance, this doctrine of LORD ELLENBOROUGH has met with almost unparalleled animadversion at the hands of the judges who have applied it.²

The law has been changed by statute in India,³ and in at least ten of our States.⁴ In one State, Mississippi, the rule was abolished

¹ 5 East, 230.

² A creditor "might take a horse or a canary or a tomtit, if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. . . . That was one of the mysteries of the English Common Law." Per JESSEL, M. R., in *Couldery v. Bartrum*, 19 Ch. D. 394, 399. "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import." Per DEWEY, J., in *Brooks v. White*, 2 Met. 283, 285. "The rule is technical and not very well supported by reason." Per NELSON, J., in 14 Wend. 116, 119. "The rule is evidently distasteful to the courts, and they have always been anxious to escape it by nice distinctions." Per *curiam* in *Smith v. Ballou*, 1 R. I. 496. "A doctrine utterly absurd, and standing, as it confessedly does, in humiliating contrast to the common sense of mankind." Per MUNRO, J., 11 Rich. 135, 139. "Several courts seem to have given assent to the rule with reluctance, and condemned the reasoning which supports it." BECK, C. J., in *Works v. Hershey*, 35 Iowa, 340, 342. "This rule being highly technical in its character, seemingly unjust, and often oppressive in its operation." Per HINTON, J., in *Symme v. Goodrich*, 80 Va. 303, 304. "The history of judicial decisions has shewn a constant effort to escape from its absurdity and injustice. . . . A moment's attention to the cases taken out of the rule will show that there is nothing of principle left in the rule itself." Per RANNEY, J., in *Harper v. Graham*, 20 Ohio, 105, 115-118. "The courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty." Per POTTER, J., in *Jaffray v. Davis*, 124 N. Y. 164, 167. See *Brown v. Kern*, 21 Wash. 211; *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. R. 724, 725; *Melroy v. Kemmerer*, 218 Pa. 381, 67 At. R. 699. Many similar criticisms might be added.

³ Indian Contract Act, Sec. 63. Also in British Columbia; Supr. Ct. Act, 1904, c. 19, Sec. 25, 3 Can. L. Rev. 377.

⁴ Ala. Code, Sec. 2774; Cal. Civ. Code, Sec. 1524; Dak. Comp. Laws, Sec. 3486;

by the court without the aid of a statute.¹ There are also limitations to the rule, which emphasize its artificiality. It is common learning, for instance, that payment of the smallest sum the day before the debt matures, or at a different place, may be an accord and satisfaction of the largest debt. At the present day, too, *Cumber v. Wane* having been overruled,² the debtor's own promise to pay five pounds, if in the form of a negotiable note, may be a satisfaction of a debt of one thousand pounds. Again, an unliquidated claim, however large, may be settled by the payment of any amount, however small.

These limitations may be logically defensible. But the same cannot be said of the important class of cases, in which two or more creditors acting in concert compromise with their debtor upon payment of a percentage of their claims. The application of the modern doctrine, as stated by LORD ELLENBOROUGH, in these cases threatened a result so alarmingly at variance with the needs of business men that the courts declined to apply the doctrine. Such compromises have been deemed valid since the case of *Good v. Cheeseman*.³ The court professed to find a consideration for each

Ga. Code, Sec. 3735; Maine Rev. St., c. 82, Sec. 45; No. Car. Code, Sec. 574; N. Dak. Rev. Code, Sec. 3827; Hill, Ann. Laws of Oregon, Sec. 755; Tenn. Code (1884), § 4539; Va. Code (1897), § 2858.

¹ *Clayton v. Clark*, 74 Miss. 499. See also to the same effect, *Smith v. Wyatt*, 2 Cincin. Sup. Ct. 12; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. R. 393. By decision, too, in some States, a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment. *Green v. Langdon*, 28 Mich. 221; *Lamprey v. Lamprey*, 29 Minn. 151 (*semble*); *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251; *McKenzie v. Harrison*, 120 N. Y. 260. In others, partial payment is a satisfaction if the debtor is insolvent. *Wescott v. Waller*, 47 Ala. 492, 498 (*semble*); *Engbretson v. Seiberling*, 122 Ia. 522, 98 N. W. 319; *Melroy v. Kemmerer*, 218 Pa. 381, 67 At. R. 699; *Shelton v. Jackson* (Tex. Civ. Appeals, 1899), 49 S. W. Rep. 414 (but see *contra* *Pearson v. Thomason*, 15 Ala. 700; *Beaver v. Fulp*, 136 Ind. 595), or even if he is honestly believed to be insolvent. *Rice v. London Co.*, 70 Minn. 77, 72 N. W. Rep. 826.

² *Sibree v. Tripp*, 15 M. & W. 22; *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Wells v. Morrison*, 91 Ind. 51; *Jaffray v. Davis*, 124 N. Y. 164 (*semble*); *Mechanics' Bank v. Huston*, 11 W. N. (Pa.) 389; *Jaffray v. Crane*, 50 Wis. 349. But see *contra*, *Overdeer v. Wiley*, 30 Ala. 769; *Siddall v. Clark*, 89 Cal. 321; *Post v. First Bank*, 138 Ill. 539 (*semble*); *Jenness v. Lane*, 26 Me. 475; *Russ v. Hobbs*, 61 N. H. 93; *Hooker v. Hyde*, 61 Wis. 204.

³ 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938; *Slater v. Jones*, L. R. 8 Ex. 186, 193. The rule is the same in this country. *Perkins v. Lockwood*, 100 Mass. 249, 250; *Bartlett v. Woodsworth Co.* 69 N. H. 316, 41 Atl. Rep. 264; *White v. Kuntz*, 107 N. Y. 518; *Continental Bank v. McGeoch*, 92 Wis. 286.

creditor's promise to relinquish a part of his claim in the similar agreement of his fellow creditors. But it is obvious that in England, at least, the debtor could acquire no rights on a promise by virtue of a consideration that did not move from himself.¹ [The frank way of dealing with these cases is to say that they can be supported only upon COKE's view, that the payment of part of a debt is a good consideration for the creditor's promise to relinquish all claim to the rest.² In his day, it is true, the only way in which the debtor could make use of such a promise was by a cross action. But in recent times such a promise would serve as a bar to an action upon the partially paid debt, on the ground of avoiding circuity of action, since what the creditor recovered in his action against the debtor, he would have to repay as damages in the cross action.

By this simple process, without any impeachment of the logic of BRIAN, or of the resolution in Pinnel's case, the mediæval rule that there cannot be an accord and satisfaction of a debt by a payment of part of it, would have ceased to have any practical operation; full effect would have been given to reasonable bargains of business men; and the law of consideration would have gained greatly in simplicity and freedom from annoying technicalities.

In 1882 the House of Lords were in a position to bring about this greatly to be desired result. In *Foakes v. Beer*,³ a creditor in consideration of the payment of the principal of the debt undertook to relinquish all claim to interest. The Lords with great reluctance, LORD BLACKBURN all but dissenting, gave judgment for the plaintiff, and chiefly for the reason that they were not prepared to overrule, as contrary to law, the doctrine stated by COKE in Pinnel's case. It is greatly to be deplored that the case of *Bagge v. Slade*, and the other similar cases, were not brought to the attention of the court. Had COKE's real opinion, as expressed in that

¹ Professor Huffcut, in his edition of Anson's *Law of Contract*, 108, n. 1, makes an excellent criticism of the futile attempts that have been made to find in the cases of composition with creditors some other consideration than the partial payment of the debts due. See *Martin v. Meles*, 179 Mass. 114.

² LORD FITZGERALD said in *Foakes v. Beer*, 9 App. Cas. 605, 630: "I concur with my noble and learned friend that it would have been wiser and better if the resolution in Pinnel's case had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of the creditors."

³ 9 App. Cas. 605.

case, been made known to the Lords, it is not improbable that they would have followed it, instead of making him stand sponsor for a doctrine contrary to his declared convictions.

Wherever a promise to relinquish a debt given in consideration of its partial payment is inoperative, a promise of temporary forbearance for the same consideration must be invalid. But no English case to this effect has been found. There are, however, numerous American decisions on the point.¹

If a promise by a creditor in consideration of the payment of a part or the whole of a debt is not enforceable, it follows that a promise in consideration of the performance of any other act due by contract to the promisor should be deemed invalid. But there is a singular dearth of cases in the English courts. The only cases found by the writer are those in which actions were brought by seamen on promises of extra compensation in consideration of their doing their duty during a storm, or after the desertion of some of the crew.² The seamen were unsuccessful in these cases, and rightly so on the ground of public policy. But in some of the cases the court gave the additional reason that the promise was without consideration.

In this country there are numerous cases in which, after the making of a bilateral contract, by which one party was to perform certain work or deliver certain merchandise, and the other was to pay a certain price therefor, one of the parties finding his bargain a losing one threatened to abandon it, whereupon the other party promised him something additional to induce him to continue. If at the time of the new promise the original contract remained to some extent executory on both sides, the new arrangement might conceivably assume different forms. Suppose, for instance, a building contract under seal, and the builder to be dissatisfied and to break his contract; the parties might mutually agree the one to

¹ *Liening v. Gould*, 13 Cal. 598; *Solary v. Stultz*, 22 Fla. 263; *Holliday v. Poole*, 77 Ga. 159; *Bush v. Rawlins*, 89 Ga. 117; *Phoenix Co. v. Rink*, 110 Ill. 538; *Shook v. State*, 6 Ind. 461; *Dare v. Hall*, 70 Ind. 545; *Davis v. Stout*, 84 Ind. 12; *Potter v. Green*, 6 All. 442; *Warren v. Hodge*, 121 Mass. 106; *Kern v. Andrews*, 59 Miss. 39; *Price v. Cannon*, 3 Mo. 453; *Tucker v. Bartle*, 85 Mo. 114; *Russ v. Hobbs*, 61 N. H. 93; *Parmalee v. Thompson*, 45 N. Y. 58; *Turnbull v. Brock*, 31 Oh. St. 649; *Yeary v. Smith*, 45 Tex. 56, 72.

² *Harris v. Watson, Peake*, 72; *Stilk v. Myrick*, 6 Esp. 129, 2 Camp. 317, s. c.; *Fraser v. Hutton*, 2 C. B. (N. S.) 512; *Harris v. Carter*, 3 E. & B. 559; *Scotson v. Pegg*, 6 H. & N. 295, per MARTIN, B. See also *Bartlett v. Wyman*, 14 Johns. 260.

go on with his work, the other to pay extra compensation. It is unreasonable to suppose that either party understood that the builder was to continue liable to an action for his breach of the original contract, or that the builder in case of non-payment would have to resort to two actions, — one upon the old contract for the original price, and one upon the new contract for the *bonus*. In other words, the parties contemplated a substitution of a new contract in place of the old one. The new contract, stated in terms of consideration, would be as follows: "In consideration that the builder promises to complete the job and to abandon all claim against the employer on the old contract, the employer promises to pay the builder the old price plus an additional amount, and to abandon his claim against the builder on the old contract." This would be a case of rescission, and the builder's right of recovery would be clear on either of the two theories of consideration under discussion in this paper.¹

¹ The following cases, in which the plaintiff recovered on the new contract, appear to have been rightly decided: *Stoudermeier v. Williamson*, 29 Ala. 558; *Connelly v. Devoe*, 37 Conn. 570; *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96; *Coyner v. Lynde*, 10 Ind. 282; *Courtenay v. Fuller*, 65 Me. 156; *Munroe v. Perkins*, 9 Pick. 298; *Holmes v. Doane*, 9 Cush. 135; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440; *Thomas v. Barnes*, 156 Mass. 581; *Goebel v. Linn*, 47 Mich. 489; *Conkling v. Tuttle*, 52 Mich. 630; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Lattimore v. Harsen*, 14 Johns. 440; *Stewart v. Keteltas*, 36 N. Y. 388; *Nesbitt v. R. R. Co.*, 2 Speers, 697, 706 (*semble*); *Domenico v. Alaska Assn.*, 112 Fed. R. 554.

The plaintiff failed in *Alaska Assn. v. Domenico*, 117 Fed. R. 99; *Ayres v. Chicago Co.*, 52 Iowa, 478; *McCarty v. Hampden Association*, 61 Iowa, 287; *King v. Duluth Co.*, 61 Minn. 482; *Lingenfelder v. Wainwright Co.*, 103 Mo. 578. But the question of rescission was not adequately considered.

In *King v. Duluth Co.*, *supra*, the court made a distinction not elsewhere suggested. The validity of the new agreement was made to turn upon the circumstances under which the losing party declined to go on. If he declined simply because he had made an unfortunate bargain, the new agreement was said to be inoperative for want of a consideration. But if he declined because of difficulties that could not reasonably have been foreseen, the new agreement would be a valid substitution for the old contract. The consideration is obviously the same in both cases. In truth, the court, in suggesting this distinction, abandoned their professed doctrine of consideration, and introduced the test of public policy. Furthermore, in defining this test, the court was unduly severe upon the plaintiff. Surely it cannot be against the public good to permit the parties to rescind the old contract and to make a new one for greater compensation to one of the parties, when the latter has made an unfortunate bargain which he honestly prefers to abandon, whatever be the consequences. On the other hand, it may well be maintained, on grounds of policy, that one who refuses to keep his contract simply in order to exploit the necessities of the other party, should not be permitted to enforce a new agreement for extra compensation obtained in a manner savoring so strongly of extortion.

Again, in the case above supposed, the employer might promise to pay the extra compensation, and the builder might complete the job, but without giving any new promise to do so. This arrangement would probably mean a substitution of a new contract for the old one. "In consideration of the builder's promise to abandon all claim against the employer on the old contract, the employer promises to abandon all claim on the old contract, and to pay the old price plus the additional amount, provided the builder completes the job." This would also be a case of rescission, and the builder would be entitled to sue on the new contract on any theory of consideration.¹

On the other hand, one of the parties to the original contract may have performed everything on his side, and the other party then refuse to do his part. If, under these circumstances, the one who has performed his part promises something extra for the other's performance, there can be no question of rescission. The case is the same in principle as the promise of a creditor in consideration of payment of the debt due to him. Only three reported cases presenting such a state of facts have been found, *Peck v. Requa*,² *Gaar v. Green*,³ and *Schneider v. Heinsheimer*.⁴ In the first of these cases the plaintiff refused to fulfill his contract with the defendant to resign a certain office on request, and the defendant, to induce him to keep his promise, gave him his promissory note. It was urged, but unsuccessfully, that there was no consideration for the note. In the second case, the buyer of a machine, for which, if kept more than six days, he was to give a note and mortgage, declined, after the six days, to keep his promise. The seller, in order to obtain the note and mortgage, then warranted the quality of the machine. The court decided that the warranty was not binding. The agreement was adjudged invalid in the third case also.

To the writer the decision in *Peck v. Requa* seems sound, but the language of the court is certainly surprising in a jurisdiction in which the doctrine of *Foakes v. Beer* is maintained: "Previously he had only the plaintiff's agreement to resign. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note in suit. By the surrender

¹ *Moore v. Detroit Works*, 14 Mich. 266; *Lawrence v. Davey*, 28 Vt. 264. But the right of the plaintiff to recover was denied in *Festerman v. Parker*, 10 Ired. 474.

² 13 Gray, 407.

³ 6 N. Dak. 48.

⁴ 55 N. Y. Sup. 630.

of an office which he had a right¹ to retain, the plaintiff suffered a detriment, and the defendant thereby gained an advantage which furnished a valid consideration for the note." It is evident from the paucity of such cases that the question, whether the performance of a pre-existing contractual duty to the promisor will support a promise, seldom arises, except in the case of a promise in consideration of the payment of part or the whole of a debt.

The examination of our three classes of cases, of which *Callisher v. Bischoffsheim*, *Shadwell v. Shadwell*, and *Foakes v. Beer* are the conspicuous illustrations, makes it clear that the authorities cannot be reconciled with any theory of consideration. We must either adopt the view that consideration is an act or forbearance not already due from the promisee, and treat the first two classes of cases as exceptions, indefensible on principle, but established as law in England, and either already representing, or likely to represent, the predominant judicial opinion in this country, or else we must adopt the other view, that consideration is any act or forbearance by the promisee, and regard the third class of cases, of which *Foakes v. Beer* is the type, as an exception contrary to principle, but sanctioned by the highest judicial authority in England and the United States.

Bearing in mind that the decisions in *Callisher v. Bischoffsheim* and *Shadwell v. Shadwell* accord with the sentiment of business men, and that it is in the highest degree improbable that the doctrine of those cases will ever be reversed by the court or overthrown by statute in the jurisdictions in which it has once been adopted; and remembering, on the other hand, that the doctrine of *Foakes v. Beer* originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and in ten of our States, and is likely to be generally superseded by similar legislation, the writer does not hesitate to choose the second of the above alternatives, and to define consideration as "any act or forbearance given in exchange for a promise," with this qualification, however, that, for the present, by an unfortunate but established anomaly, a creditor's promise in consideration of the payment of the whole or a part of the debt by his debtor is

¹ This must mean simply that he could not be ejected from the office.

invalid. This definition unquestionably makes for individual freedom of contract and for logical simplicity in the law. It is believed, also, to be a just deduction from the decided cases.

II. BILATERAL CONTRACTS.

Since a promise is an act, one who defines consideration as any act or forbearance given in exchange for a promise, will necessarily find a consideration in every case of mutual promises. This, it is submitted, is the correct view upon principle.¹ In point of authority no difficulty is presented except in two classes of cases. First, those in which one of the parties promises to perform a "pre-existing contractual duty to a third person. Secondly, those in which one of the parties promises to perform a pre-existing contractual duty to the counter-promisor. It will be convenient to deal with these two classes of cases separately.

I. Promises of performance of a pre-existing contractual duty to a third person.

There is believed to be no reported case in which a promise to perform a contract with A. has been adjudged insufficient to support a promise by B. In a few American cases in which the plaintiff failed to recover upon a unilateral promise given in consideration of the performance of the plaintiff's contract with another, there are *dicta* placing the agreement to do and the doing of what one is already bound to do upon the same footing.² On the other hand, in *Shadwell v. Shadwell*³ and *Scotson v. Pegg*,⁴ in which the de-

¹ Public policy may forbid the enforcement of a bilateral contract as it frequently precludes recovery upon unilateral contracts. A promise, for instance, in consideration of a counter-promise to commit a crime, or a tort, will not give a cause of action. The same is true of a promise of abstention from the commission of a crime or tort or grossly immoral conduct or from the breach of an official or statutory duty. It is clearly against the interest of the community to allow an action in these cases, notwithstanding the formal contract that is completed by the promise and the consideration.

² *Reynolds v. Nugent*, 25 Ind. 328, 329, 330; *Harrison v. Cassady*, 107 Ind. 158, 168; *Schuler v. Myton*, 48 Kans. 282, 288; *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401; *Seybolt v. New York Co.*, 95 N. Y. 562, 575. See also *Jones v. Waite*, 5 Bing. N. C. 341, 351, 356, 358-359. To these cases may be added *Ecker v. McAllister*, 45 Md. 290, 54 Md. 362. In this case the court in deciding, in opposition to the majority of the modern authorities, that forbearance to prosecute a *bona fide* but groundless claim against A. was not a consideration for a promise by B., said extrajudicially that a promise of such forbearance would not support a counter-promise by B.

³ 9 C. B. N. S. 159.

⁴ 6 H. & N. 295.

fendant was charged upon a unilateral contract, the plaintiff would, without doubt, have been equally successful had the contract been bilateral. The plaintiff did succeed upon similar bilateral contracts in *Abbot v. Doane*¹ and *Green v. Kelley*.²

The only judicial intimation of a distinction, in point of consideration, between the performance and a promise to perform a contractual duty to a third person is this statement by JAMES, J., in *Merrick v. Giddings*.³ "A promise made in consideration of the doing of an act which the promisee is already under obligation to the third party to do . . . is not binding, because it is not supported by a valuable consideration. On the other hand, if a promise be made in consideration of a *promise* to do that act . . . then the promise is binding, because not made in consideration of the performance of an existing obligation to another person, but upon a new consideration moving between the promisor and promisee." This *dictum* was confessedly inspired by the following passage from Pollock on Contracts:⁴ "But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B. may be very much interested in A.'s performing his contract with C., but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may be well worth his while to give something for being enabled to insist in his own right on the thing being done." The court seems not to have been aware that the same distinction had been taken by Professor Langdell in his summary of the law of Contracts:⁵ "It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding, though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not therefore be a sufficient consideration. The reason of this distinction is that a person does not, in legal contemplation, incur any detriment by doing a

¹ 163 Mass. 433.

² 64 Vt. 309.

³ 1 Mack. 394, 410, 411.

⁴ 1st ed., 158. It is to be regretted that the learned author came afterwards to doubt the soundness of this statement. Contracts, 4th ed., 179; 3 Eng. Encycl. of Law, 341. See now his 7th ed.

⁵ Sect. 84.

the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle. The supposed difficulty in this class of cases springs from the assumption that the consideration in a bilateral contract is the legal obligation, as distinguished from the promise, of each party. But this is to overlook the difference between the act of a party and the legal result of the act. The party does the act, the law imposes the obligation. Suppose, for example, that X. promises to pay A. a certain amount of money in consideration of A.'s signing, sealing, and delivering, *animo contrahendi*, a writing containing a promise by A. to convey a certain tract of land to X., and that A. does sign, seal, and deliver the written promise accordingly. X. is unquestionably bound by this acceptance of his offer. A., however, has done nothing beyond the performance of certain formal acts. These acts alone must form the consideration of X.'s promise. Indeed X. by the express terms of his offer stipulated for precisely that consideration. He was willing to do so, of course, because the performance of those acts would bring A. within the rule of law which imposes an obligation upon any one who executes a sealed promise. Precisely the same reasoning applies in the case of mutual promises. Each party is content to have the promise of the other given *animo contrahendi*, because each is thereby brought within the rule of law which imposes an obligation upon any one who has received what he bargained for in return for his promise.

The form of declaration upon a bilateral contract is significant. The count never alleges any obligation on the part of the plaintiff, but states simply, in accordance with the facts, that, in consideration that the plaintiff promised to do a certain thing, the defendant promised to do a certain other thing. The courts too from the earliest times of mutual promises have designated the promise as the consideration of the counter-promise.¹

¹ *Wichals v. Johns* (1599), Cro. El. 703. "A promise against a promise is a good consideration"; *Bettisworth v. Campion* (1608), Yelv. 134: "The consideration on

The fact that it is the promise and not the legal obligation of each party that forms the consideration for the promise of the other, explains certain classes of cases in which one party is under a legal liability from the outset, although no action will ever be maintainable against the other. If, for example, A. is induced to enter into a bilateral contract with B. by the fraud of the latter, the contract cannot be enforced against A., but A. may enforce it against B. This is shown by several cases of engagement to marry between a man already married and a woman who believed him to be single.¹ The consideration is ample on both sides, but public policy forbids an action in favor of the deceiver, but cannot be urged against a recovery by the innocent party.² The same result would follow in the case of a bilateral contract procured by duress practised by one of the parties upon the other. Again, if only one of the parties to a bilateral contract within the Statute of Frauds has signed a memorandum, he may be charged upon the contract, although he cannot charge the other party.³ He must suffer, not because either promise lacks consideration, but for his fault in not obtaining a memorandum of the contract signed by his adversary. Similarly an adult is bound by his promise, although he has no remedy on the counter-promise of an infant, it being thought expedient to give the latter this protection against his own improvidence.⁴ Whether a bilateral contract is enforceable by either of the parties if one was insane when the promises were given is not definitely settled.⁵ It would seem reasonable to charge the sane promisor if he was aware of his co-promisor's insanity, but not otherwise. The same distinction should obtain, in the absence of legislation enabling a

each part was the mutual promise of the one to the other." See also *Strangborough v. Warner* (1588), 4 Leon. 3; *Gower v. Capper* (1597), Cro. El. 543.

¹ *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Ex. 775; *Kelley v. Riley*, 106 Mass. 339; *Blattmacher v. Saal*, 29 Barb. 22; *Cammerer v. Muller*, 14 N. Y. Sup. 511, affirmed without opinion in 133 N. Y. 623; *Stevenson v. Pettis*, 12 Phila. 468; *Coover v. Davenport*, 1 Heisk. 363; *Pollock v. Sullivan*, 53 Vt. 507.

² If the woman knew that her fiancé was already married, neither can maintain an action against the other. *Noice v. Brown*, 39 N. J. 133; *Haviland v. Halsted*, 34 N. Y. 643.

³ *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Justice v. Lang*, 42 N. Y. 493, and cases cited in Browne, *Statute of Frauds*, 5th ed., 495, n. 1.

⁴ *Holt v. Ward*, 2 Stra. 937; *Bruce v. Warwick*, 6 Taunt. 118; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Atwell v. Jenkins*, 163 Mass. 362 (*semble*); *Moynahan v. Agricultural Co.*, 53 Mich. 238; *Hunt v. Peake*, 5 Cow. 475.

⁵ See *Atwell v. Jenkins*, 163 Mass. 362, 364.

married woman to contract, in the case of mutual promises between a married woman and another. But there is no recognition of this distinction in the decisions; nor, on the other hand, has any decision been found at variance with it.¹ A married woman's freedom to contract is now so generally sanctioned by statute that the validity of the distinction here suggested is not likely to be brought to the test of judicial decision. But if, before the modern legislation, a man had said to a married woman: "I know your promise is not legally binding; nevertheless if you will promise, with the intention of keeping your word, to use your influence with your husband in favor of sending your son to college, I will promise to pay his tuition fees," and the woman promised accordingly, is there any reason why the man should not be bound by his promise? Mutual promises between a corporation acting *ultra vires* and another give no right of action to either party. Public policy demands this result. As LORD CAMPBELL, C. J., said: "It would indeed be strange if a corporation entering into a commercial contract might enforce it at pleasure, but might break it with impunity whenever fraudulently induced to do so."²

That the consideration in bilateral contracts is the promise and not the legal obligation of each party is most convincingly proved by the cases in which, from the very nature of the transaction, and as both parties clearly understand, mutual obligations are impossible. In a wager, for example, upon an issue already irrevocably determined, but the determination of which is unknown to the parties, one of them is liable to an action at the very moment of the wager, while the other is not then nor ever will be bound to do anything.³ Suppose, again, a difference to arise between the parties to a sale as to the number of acres in a tract of land sold as

¹ In several cases bills by married women for specific performance have been dismissed in accordance with the familiar principle that specific performance will not be decreed unless the remedy is mutual. *Banbury v. Arnold*, 91 Cal. 606; *Warren v. Costello*, 109 Mo. 338; *Lanier v. Ross*, 1 Dev. & B. Eq. 39; *Tarr v. Scott*, 4 Brewst. (Pa.) 49; *Williams v. Graves*, 7 Tex. Civ. Ap. 356; *Shenandoah Co. v. Dunlop*, 86 Va. 346. In *Shaver v. Bear River Co.*, 10 Cal. 396, the counter-promise was *ultra vires*. See *Berry v. Berry*, 31 Ia. 408.

² *Copper Miners v. Fox*, 16 Q. B. 229, 237.

³ "There was a wager laid between A. and B. concerning the quantity of yards of velvet in a cloak, and each of them agreed that if there were ten yards of velvet in the cloak that then they should be delivered to B., and if not to A. This is good and may be pursued accordingly." *Shep. Act.*, 2d ed., p. 178.

containing five hundred acres, and the seller to promise to pay \$20 for every acre less than five hundred in return for the buyer's promise to pay \$20 for every acre in excess of five hundred. Here, too, one of the parties is free and the other bound the moment the promises are exchanged. Judgment was given for the plaintiff in such a case.¹ If the consideration of the enforceable promise must be found, if at all, in a legal obligation of the party giving the counter-promise, it would be impossible to support the decision in this and similar cases. But the decisions are clearly right if the mere promise of the winner is the consideration for the promise of the loser. That this was the intention of the parties can hardly be questioned. Each one gives his promise in exchange for a counter-promise which he knows may prove worthless to him. But because of his ignorance of the true state of the case each is content to take the promise of the other for better or worse, and the loser is justly bound by his bargain because he has received in exchange for his promise the very thing that he asked for.

The question whether a promise to perform a pre-existing contractual duty to a third person may be a consideration for a counter-promise has been discussed thus far as a matter of principle. As already stated, although there are some adverse *dicta*, there is no decision adjudging such a consideration to be invalid. But these *dicta* are more than offset by an important class of decisions, which cannot be sustained except upon the theory that such a consideration is valid. These decisions illustrate one form of the familiar doctrine of novation. C., for instance, conveys property to A., who promises therefor to pay C.'s debt to B. Subsequently A. and B. enter into a bilateral contract, A. promising to B. to pay C.'s debt to him, and B. promising A. never to sue C. upon the debt. B.'s promise operates as an equitable release of C., and A. becomes bound to B. in C.'s place. And yet A. has promised B. only what he was already bound to do by his prior contract with C. No one can doubt that the validity of this form of novation is firmly established in our law.²

¹ Seward v. Mitchell, 1 Coldw. 87; Williston, Cases on Contracts, s. c. 554. See to the same effect, March v. Pigott, 5 Burr. 2802; Barnum v. Barnum, 8 Conn. 469; Howe v. O'Malley, 1 Murph. 287; Supreme Assembly v. Campbell, 17 R. I. 402. Professor Langdell considers these cases erroneous in principle, and regards them as illustrations of the rule "Communis error facit jus." Summary, sect. 69.

² Bird v. Gammon, 3 Bing. N. C. 883; Re Times Co., 5 Ch. 381; Re Medical Co., 6 Ch. 362; Rolfe v. Flower, L. R. 1 P. C. 27; McLarin v. Hutchinson, 22 Cal. 187;

But more than this, any theory of consideration which would nullify this rational business arrangement stands *ipso facto* condemned, unless inexorable logic compels its recognition. But, if the reasoning in the preceding pages is sound, the logic is all in favor of the novation.

No other decisions upon the point under discussion have been found. But imaginary cases may be put. C., wishing to assist his friend B., makes a bilateral contract with A., A. promising to discount all bills offered by B. between January and July, 1898, up to the limit of \$10,000, and C. promising to indemnify A. Subsequently B. obtains a similar promise from A. to himself in return for a promise on his own part. A. afterwards declines to discount bills when offered, claiming that the mutual promises between himself and B. are not binding because his own promise was to do what he was already bound to do by his contract with C.¹

Again, a father wishing his son to live in a house near his own, promises the son to furnish the house in return for the son's promise to buy it of X., the owner. Subsequently the son and X. enter into a mutual written agreement for the purchase of the house. The

Bowen v. Kurtz, 37 Iowa, 239; *Langdon v. Hughes*, 107 Mass. 272; *Scott v. Hallock*, 16 Wash. 439.

¹ By varying slightly the facts of this supposed case and applying the theory of those who dissent from *Shadwell v. Shadwell* and *Scotson v. Pegg*, namely, that the performance of an existing contract with a third person cannot be a consideration for a promise, we obtain a somewhat startling result. Suppose C., instead of asking for A.'s promise, merely to offer to indemnify A. as to all bills that he may discount for B. in a given period up to a given limit. Then, as before, A. and B. make their bilateral arrangement to discount and reimburse. A. thereupon discounts bills when offered, but B. becomes insolvent. A. then seeks to charge C. upon his promise to indemnify. C., however, disclaims liability, because A. in discounting the bills was simply performing his contract with B. Suppose still another case. C. being interested in the welfare of two young men, A. and B., promises each of them \$500 in consideration of their abstaining from the use of intoxicating liquor during the year 1897. To strengthen their resolution to earn the reward, A. and B. enter into a bilateral contract not to use intoxicating liquor during 1897. They keep this contract, but on applying to C. for the promised reward are told that he has changed his mind and that they have no legal claim against him, since they have simply performed their pre-existing contractual duty to each other. Furthermore, those who disapprove of *Shadwell v. Shadwell* must, to be consistent, dissent from *Gurin v. Cromartie*, 11 Ired. 174 (see also *Greenling v. Bawdit*, Sty. 404, and *Culliar v. Jermin*, Sty. 463), in which case C. was charged upon a promise in consideration of marriage by a promisee who had no fiancée at the time of C.'s offer to him. One may well hesitate to acquiesce in a doctrine of consideration that would exonerate C. in these three cases. Such a result would be grotesque were it not also unjust.

father then learns that a more desirable house may be obtained at the same price, and agrees to furnish that instead of the other. The son accordingly notifies X. that he will not take X.'s house, and when reminded of his contract answers, "Oh, our agreement was no contract. I had already promised my father to buy the house, so my promise to you to buy it was no consideration for your promise, and both promises are worthless." Would any court exonerate the son?

II. Promises of performance of a pre-existing contractual duty to counter-promisor.

If the parties to a contract see fit for any reason satisfactory to themselves to make a bilateral agreement whereby one of the parties promises to perform his previous contract, it is difficult to see any objection to this genuine bargain on the score of consideration. The new promise is an act, and rendered by one who was entirely free to withhold it. The authorities were formerly in harmony with this logical conclusion.

In 1602, in *Goring v. Goring*,¹ which was a case of mutual promises by the creditor's executor to accept and by the debtor to pay 150 pounds in annual instalments in satisfaction of 205 pounds, the debtor was charged upon the new promise, the court saying: "The consideration alleged is sufficient for another reason; . . . for the plaintiff agreeing to take 150 pounds for 205 pounds is a promise on his part, and so one promise against another." Ten years later another creditor succeeded against his debtor upon the new bilateral agreement, *FLEMMING*, C. J., remarking: "This is a very plain and clear case: here the promise is mutual; the plaintiff promised to stay and surcease his suit, and the defendant promised to pay 100 pounds."²

The first case in which a new bilateral agreement between a creditor and debtor was judged invalid was *Lynn v. Bruce*.³ There were mutual promises, as in *Goring v. Goring*,¹ by the creditor to accept and by the debtor to pay 73 pounds in satisfaction of a debt of 105 pounds. The debtor paying only 70 pounds, the creditor brought an action for the other 3 pounds. The plaintiff was un-

¹ Yelv. 11.

² *Pooley v. Gilberd*, 2 Bulst. 41. See to the same effect *Woolaston v. Webb* (1611), Hob. 18; *Flight v. Gresh* (1625), Hutt. 77, 78; *Cowlin v. Cook* (1626), Noy, 83, Latch. 151, Poph. 183. See further, *Thomas v. Way*, 172 Mass. 423, 52 N. E. R. 525, per HOLMES, J.

³ 2 H. Bl. 317.

successful; not, however, because the debtor's promise to pay a part of his debt was not a consideration, but, strangely enough, because in the opinion of the court the plaintiff's promise was not a consideration. *Goring v. Goring*¹ was not cited, and the court considered themselves bound by the numerous cases in which an accord unexecuted had been held to be no bar to an action upon the original debt. "It was argued," say the court, "according to the cases in *Rol. Abr.*, that an accord executory in any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar."

Truly a singular perversion.² The explanation just given of *Lynn v. Bruce* is confirmed by the equally remarkable decision in *Reeves v. Hearne*.³ A creditor agreed to accept and the debtor agreed to give a suit of clothes in satisfaction of the debt. It seems impossible to detect any flaw in this bilateral contract; and yet the creditor was not permitted to recover upon a breach of the promise to deliver the clothes. The court simply followed *Lynn v. Bruce*. Because the creditor could, notwithstanding the new agreement, sue upon his old claim, he should not be permitted to

¹ *Yelv.* 11.

² The value of this reasoning will be better appreciated by comparing an accord with an award. Originally, if parties submitted a controversy to arbitration, an award that one party pay a definite amount of money to the other created a debt recoverable by action, and also barred the original claim. An accord, — that is, mutual promises, — on the other hand, was neither a cause of action nor a bar to an action before the days of *assumpsit*. *Fitz. Abr. f.* 15, pl. 5; *Y. B.* 5 Ed. IV. 7-13; *Y. B.* 16 Ed. IV. 8-5; *Y. B.* 17 Ed. IV. 8-6; *Y. B.* 6 Hen. VII. 11-8; *Andrews v. Boughey*, Dy. 75 a, 75 b; *Onely v. Kent*, Dy. 355 b, 356 a. Even an award to do something other than the payment of money had no more legal effect than an accord; for debt was, in early times, the only remedy upon an award. *Y. B.* 16 Ed. IV. 8-5; 2 *Harv. Law Rev.* 62. But after *assumpsit* came in and implied promises in fact were recognized, any award barred the original claim, since the successful party could sue upon the other's breach of his promise to abide by the award. 2 *Harv. Law Rev.* 62. The attempt to make an accord also a bar to the original claim by reason of the new remedy of *assumpsit* upon the promise failed, as it ought to fail. *Allen v. Harris*, 1 *Ld. Ray.* 122; *James v. David*, 5 *T. R.* 141; *Bayley v. Homan*, 3 *Bing. N. C.* 915; *Gabriel v. Dresser*, 15 *C. B.* 622. In the case of the award it was not the promises but the subsequent award that constituted the bar. So in the accord it is the subsequent performance that corresponds to the award. If, however, the parties explicitly agree that the new promise, as distinguished from its performance, shall of itself be a satisfaction of the original claim, it will so operate. *Hale v. Flockton*, 14 *Q. B.* 380, 16 *Q. B.* 1039 (*semble*); *Johnassohn v. Ransome*, 3 *C. B. N. s.* 779 (*semble*); *Kromer v. Heim*, 75 *N. Y.* 574.

³ 1 *M. & W.* 323.

have an action on the new promise. *Reeves v. Hearne* and the reasoning in *Lynn v. Bruce*, if not the case itself, are effectually discredited by later decisions.¹

Professor Langdell supports *Lynn v. Bruce* on the ground that a debtor's promise to his creditor to pay his debt is not a consideration.² But he cites no other authority for this view. The same view is expressed by Leake³ and Pollock,⁴ but without reference to *Lynn v. Bruce*, and is supported by *obiter dicta* of the judges in the few cases that they cite.⁵ Professor Williston⁶ and Professor Harriman⁷ also entertain a similar opinion. One who dissents from such an array of expert opinion cannot fail to recognize the vehemence of the presumption against his own view. But in the present instance it may be fairly urged in point of authority that these writers seem not to have considered the early decisions adverse to their doctrine, that there is not a vestige of authority in its support prior to 1828, and that there is no English decision in its favor since that date.⁸

The reason for this modern doctrine is thus expressed by Pollock: "It is obvious that an express promise by A. to B. to do something which B. can already call on him to do can in contemplation of law produce no fresh advantage to B. or detriment to A."⁹

¹ *Crowther v. Farrer*, 15 Q. B. 677; *Nash v. Armstrong*, 10 C. B. N. S. 259.

² Summary, sect. 89.

³ Cont., 2d ed., 619.

⁴ Cont., 6th ed., 176.

⁵ *Bayley v. Homan*, 3 Bing. N. C. 915, 921; *Jackson v. Cobbin*, 8 M. & W. 790; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Frazer v. Hatton*, 2 C. B. N. S. 512, 524. To these may be added *Philpot v. Briant*, 4 Bing. 717, 721; *Lyth v. Ault*, 7 Ex. 669, 674.

⁶ 8 Harv. Law Rev. 27.

⁷ Cont., 65.

⁸ The doctrine has, however, prevailed in a few of our States. *Ford v. Garner*, 15 Ind. 298; *Eblin v. Miller*, 78 Ky. 371. See also the following note.

⁹ Cont., 6th ed., 176. The American cases in the preceding note proceed upon this same principle. The principle was singularly misapplied by several courts to mutual promises by a creditor to forbear to sue until a fixed day upon a claim already due, and by the debtor to pay at that day legal interest in addition to the principal. *Abel v. Alexander*, 45 Ind. 523; *Hume v. Mazelin*, 84 Ind. 574; *Holmes v. Boyd*, 90 Ind. 332; *Wilson v. Powers*, 130 Mass. 127 (*semble*); *Hale v. Forbes*, 3 Mont. 395; *Grover v. Hoppock*, 2 Dutch. 191; *Kellogg v. Olmsted*, 25 N. Y. 189; *Parmelee v. Thompson*, 45 N. Y. 58; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. R. 5; *Stickler v. Giles*, 9 Wash. 147 (*semble*). The right to an assured income for a definite period is surely a fresh advantage to the creditor, and the duty to pay it is a fresh detriment to the debtor. Accordingly, such a bilateral agreement is generally upheld in this country. *Stallings v. Johnson*, 27 Ga. 564; *Crossman v. Wohlleben*, 90 Ill. 537, 541; *Royal v. Lindsay*, 15 Kan. 591; *Shepherd v. Thompson*, 2 Bush, 176; *Alley v. Hopkins*, 98 Ky. 668; *Chute v. Parke*, 37 Me. 102; *Simpson v. Evans*, 44 Minn. 419; *Moore v.*

To this it may be answered that the law does not pretend to measure the adequacy of a consideration, if there is any consideration. Certainly the making of the new promise by A. is an act, and one which he was under no obligation to give. If B. thought it sufficiently for his interest to give a counter promise in exchange for A.'s promise, and the mutual agreement is open to no objection on grounds of policy, why should not the court give effect to this bargain as fully as to any other? Furthermore, if the court is to assume the function of measuring the value of an act given in exchange for a promise, we shall have a new crop of fine-spun distinctions. One of these distinctions is illustrated by *Lyth v. Ault*.¹ One of two joint debtors promised to pay the debt in return for the creditor's promise never to sue his co-debtor. The agreement was held valid, because the separate promise of the one might be of more value than the joint promise of the two.² If the sole promise to pay the entire claim is more valuable than the original joint liability, the sole promise to pay 99 per cent of the claim might also be more valuable. If this is true of a promise of 99 per cent, why not also of a promise of 90 per cent or 50 per cent or of 1 per cent? Where is it possible to draw the line? Obviously this distinction between a new promise by the two joint-debtors and a new promise by one of them is highly technical. But the distinction leads to one result worse than technical. Wherever the doctrine of *Foakes v. Beer* obtains, payment of the whole or a part of the joint debt by one of the debtors is not a valid consideration for a promise of the creditor.³ And yet by *Lyth v. Ault* a sole promise of such payment is a valid consideration. The bird in the hand is worth less than the bird in the bush! Truly it is a novel standard of value that the courts would give us in overriding the bargain of the parties.⁴

Redding, 69 Miss. 841; *Fowler v. Brooks*, 13 N. H. 240; *McComb v. Kittridge*, 14 Oh. 348; *Fawcett v. Freshwater*, 31 Ohio St. 637; *Benson v. Phipps*, 87 Tex. 578.

¹ 7 Ex. 669.

² A similar agreement was upheld in *Morris v. Van Vorst*, 1 Zab. 100, 119; *Ludington v. Bell*, 77 N. Y. 138; *Allison v. Abendroth*, 108 N. Y. 138; *Jaffray v. Davis*, 124 N. Y. 164, 173 (*semble*). But see *contra* *Early v. Burt*, 68 Iowa, 716.

³ *Deering v. Moore*, 86 Me. 181; *Weber v. Couch*, 134 Mass. 26; *Line v. Nelson*, 38 N. J. 358; *Harrison v. Wilcox*, 2 Johns. 448; *Martin v. Frantz*, 127 Pa. 389.

⁴ In *Bendix v. Ayers*, 21 N. Y. Ap. Div. 570, the court decided that the part payment of a joint debt by one of the debtors was a valid consideration, because the promise of partial payment by one of the debtors, which was confessedly valid, "is certainly

The technical character of the modern attempt to determine the value of a promise may be shown in another way. It has often been decided that a promise by a debtor to pay his debt at a future day in consideration of actual forbearance by the creditor in the meantime is binding.¹ A similar promise by the debtor in consideration of the creditor's covenant to forbear must be equally valid. Shall a similar promise in consideration of the creditor's simple promise to forbear be invalid?

Again, as appears from *Morton v. Burn*,² the assignee of a chose in action may make a valid bilateral contract with the debtor, the assignee promising to forbear for a time to sue the debtor in the name of the creditor (or to-day in his own name) in return for the debtor's promise to him to pay the debt. Shall such mutual promises between the assignee, the *dominus* of the claim, and the debtor be valid, but similar promises between a creditor and the debtor when the debt is not assigned be invalid?

Since a right of action in assumpsit may be more advantageous than an action of covenant either because the specialty may be lost, or the creditor might wish to join his action with other counts in assumpsit, or for some other reason, shall a promise by a specialty debtor to pay his debt be a consideration for a promise by the creditor, and a similar promise by a simple contract creditor be no consideration?

Since a promise in writing is more readily proved than an oral promise, shall the new bilateral written agreement by the creditor to forbear and the debtor to pay be valid if the original debt was oral, but not valid if it was in writing?

Even if this test of value is to be applied, must not every promise of payment made by a simple contract debtor after the debt is due be a consideration? For the new promise is in one respect more valuable than the old liability, since it will survive after the old claim is barred by the Statute of Limitations.³

not as advantageous to the creditor as the acceptance of the actual money." The good sense of the argument is indisputable, but the doctrine of *Foakes v. Beer* is still law in New York.

¹ *Smith v. Hitchcock*, 1 Leon. 252; *Tenancy v. Brown*, Cro. El. 272; *May v. Alvares*, Cro. El. 387; *Baker v. Jacob*, 1 Bulst. 41; *Pete v. Tongue*, 1 Roll. R. 404; *King v. Weeden*, Sty. 264; *Boone v. Eyre*, 2 W. Bl. 1312; *Hopkins v. Logan*, 5 M. & W. 241.

² 7 A. & E. 19.

³ *Stallings v. Johnson*, 27 Ga. 564. See also *Hopkins v. Logan*, 5 M. & W. 241.

On the other hand, this same test of value is irreconcilable with two classes of decisions which are not likely to be overruled. First, those allowing an action upon a wager on a past event or upon the kindred mutual promises already considered.¹ For at the moment of the bargain one of the promises, as both parties know, must be worthless. Secondly, the cases, already discussed,² in which one of the parties to a bilateral contract wrongfully refusing to go on, it is mutually agreed to rescind the contract and to substitute a new one in its place, whereby the dissatisfied party agrees to perform his original undertaking in return for the other's promise of larger compensation. In neither of these classes of cases can there be a consideration, except upon the principle that any act by a promisee in exchange for a promise is a consideration.

It is clear that this innovation of the nineteenth century, by which the courts assume to determine the value of an act irrespective of the value set upon it by the parties, is not a success. It breaks up reasonable bargains, and cumbers the law with unreasonable distinctions. It is not yet too late to abandon this modern invention and to return to the simple doctrine of the fathers, who found a consideration in the mere fact of a bargain, in other words, in any act or forbearance given in exchange for a promise. This rule gives the formality needed as a safeguard against thoughtless gratuitous promises, meets the requirements of business men, and frees the law of consideration from subtleties that serve no useful purpose.

¹ *Supra*, page 345, note 3, and page 346, note 1.

² 12 Harv. Law Rev. 528, n. 2.

THE VOCATION OF THE LAW PROFESSOR.¹

ON a broad shaded street in one of the most beautiful of New England villages, stands an attractive old Colonial house, the residence, at the close of the American Revolution, of a Connecticut lawyer. Hard by the house was the owner's law office, a small one-story wooden building much resembling the familiar district school-house. There was nothing about it to catch the eye, but it has a peculiar interest for the lawyer, as the birthplace of the American Law School. For it was to this building that young men came from all parts of the country to listen to the lectures of Judge Reeve, the founder of the celebrated Litchfield Law School.

It is indeed a far cry from the small lecture room of Judge Reeve to this noble structure destined to be for centuries the spacious and well-appointed home of a great university law school. From her humbler home in Cambridge, I gladly bring the greetings and congratulations of the elder to the younger sister, and I am deeply sensible of the privilege of saying here a few words upon a topic that is near to the hearts of both.

On this red-letter day in the history of law schools, we may look back for a moment upon the path of legal education, if only to take courage for further achievement, as we watch the steadily growing conviction, in this country at least, (that law is a science) and as such can best be taught by the law faculty of a university.

With the revival of interest in the Roman Law, students flocked to the mediæval universities, notably to Bologna and Paris; and in countries where the system of law is essentially Roman, the tradition of obtaining one's legal education at a university has continued unbroken. Indeed, upon the continent of Europe a university law school is the only avenue to the legal profession. But the English law was not Romanized. For this, any one who thinks of trial by jury, of the beneficence of English equity, and of the unrivaled English judiciary, may well be thankful. But as a consequence of the

¹ An address delivered on February 21, 1901, at the dedication of the new building of the Department of Law of the University of Pennsylvania.

non-acceptance of Roman Law, early English lawyers were not bred at Oxford or Cambridge. For the universities were in the hands of the ecclesiastics, who naturally confined their attention to the canon and civil law. Another reason may be found in the well-known dialogue between Lord Chancellor Fortescue and the young Prince of Wales in praise of the laws of England. The Prince having asked why the laws of England were not taught at the universities, the Chancellor replied: "In the universities of England sciences are not taught but in the Latin tongue, and the laws of the land are to be learned in the three several tongues, to witte, in the English tongue, the French tongue, and the Latin tongue."

English lawyers, therefore, obtained their legal training in London, and, in early times, at the Inns of Court, which, with the dependent Chancery Inns, were called by Fortescue and Coke a legal university. In the days of these writers the term was not inapt. The membership of the inns was made up of students, resident graduates, called barristers, readers, or professors, and benchers, or ex-professors, all living together in their dormitories and dining-halls, in that spirit of comradeship which has added so much to the attractiveness and influence of the legal profession. They lived, too, in an atmosphere of legal thought. Every day after dinner, and every night after supper, there were discussions of legal questions after the manner of a moot-court. There were also lectures by the old barristers, which were followed by discussions of the chief points of the lectures. But the lectures and discussions came in time to be regarded as too great a burden upon the lawyers. They were at first shortened, and finally, in the latter half of the seventeenth century, given up altogether.

A legal education being no longer obtainable in the Inns of Court, students of law trusted to private reading, supplemented at first by experience in attorneys' offices, but after Lord Mansfield's day, in the chambers of special pleaders, conveyancers, or equity draughtsmen.

The decay of the Inns of Court seems not to have excited, for two hundred and fifty years, any adverse comment. But towards the middle of this reforming century many influential lawyers were impressed with the need of a better preparation for admission to the Bar. In 1846 a Parliamentary Commission, after hearing the testimony of a large number of witnesses, reported that the state of

legal education in England was "extremely unsatisfactory and incomplete," and "strikingly inferior to such education in all the more civilized states of Europe and America," and recommended that the Inns of Court should resume their ancient function of a legal university. Five annual courses of lectures in law were the meagre result of this report.

In 1855 a second Parliamentary Commission, including Vice-Chancellor Wood, Sir Richard Bethell (Lord Westbury) and Sir Alexander Cockburn, recommended that a university be constituted with a power of conferring degrees in law. This recommendation had no effect. Some twenty years later, under the leadership of Lord Selborne, an attempt was made to bring about the establishment of a general school of law in London by the action of Parliament. But the attempt was unsuccessful. Finally, six years ago, a third Parliamentary Commission reported in favor of a Faculty of Law in the proposed teaching University of London. And there the matter rests, although Lord Russell has recently expressed the hope "that the effort may once more be made, and this time successfully made, to establish what Westbury and Selborne hoped and worked for, a great school of law."

As a result of the agitation of the last sixty years, six readers and four assistant readers give some thirty hours of legal instruction per week throughout the year, and only those may be called to the Bar who have passed successfully certain examinations. These examinations represent about one third of the work covered by those of the Law School of the University of Pennsylvania, and, in the opinion of competent judges, do not afford any trustworthy test of adequate knowledge of the law. No attendance is required at the readers' lectures or classes, and the actual attendance is small. There is no permanent teaching staff. The teachers are appointed for a term of three years. They may or may not be reappointed. Incredible as it may appear, at the end of their term, in 1898, the ten readers and assistant readers were all dropped and replaced by a wholly new decemvirate. The reason for this clean sweep is almost more surprising than the change itself. The Council of Legal Education, as one of the members informed Lord Russell, "thought if they did not effect frequent changes, and thus permitted the idea to grow up that the teachers should be continued in office so long as they did their work well, it would be interfering with them in the pursuit of their pro-

fession, and it would be unfair to remove them later." Lord Russell, in criticising this novel conception of a professorial staff, says truly that "such a policy renders it impossible to look to the creation of an experienced professional class of teachers." There is obviously a wide gap between this school of the Inns of Court and the leading law schools in this country with a three years' course, compulsory attendance, searching annual examinations, and a faculty of permanent professors.

One naturally asks, Why did not the universities assume the work of legal education which the Inns of Court abandoned? The answer is simple. The traditions of centuries were against such an innovation. It is true that the Vinerian professorship of the Common Law, to which we owe the world-renowned Commentaries of Blackstone, was established at Oxford in the middle of the last century, and this was followed some forty years later by the similar Downing professorship at Cambridge. But only within the last thirty years has really valuable work been accomplished at the universities by a body of competent and permanent teachers. Even now the department of law at Oxford and Cambridge is not and does not claim to be a professional school. A large part of the curriculum is devoted to Roman Law, Jurisprudence, and International Law, and a large majority of those who take the law course are undergraduates who propose to take their B.A. degree in law. Mr. Raleigh, one time Vinerian Reader in English Law, tells us that the best men at Oxford seldom begin the study of law until they go to London, and he thinks, in common with many others, that the ancient universities committed a grave mistake when they placed law among the subjects that qualify for the degree of B.A.

I regret to find that Sir Frederick Pollock considers this mistake irrevocable. American law professors would generally agree that a college student had better let law alone until he has completed his undergraduate course. Until the law course is made exclusively a post-graduate course, and Roman Law, Jurisprudence, and International Law are made electives in the third year of the curriculum, instead of required subjects of the first year, and the staff of permanent professors materially enlarged, those of us who would like to see a strong professional school of law at the English universities, are not likely to have our dreams realized.

There must be, of course, some sufficient reason why, notwith-

standing the recommendations of successive Parliamentary Commissions, and the earnest efforts of men like Lord Westbury, Lord Selborne, and Lord Russell, so little progress has been made, either in London or at Oxford or Cambridge, towards the establishment of a law school comparable to the best schools in other countries. A distinguished lawyer of this city suggested, many years ago, the quaint explanation that in a country in which the law consists of the decisions of the judges, "it might be politic not to encourage academic schools of the national jurisprudence lest ambitious professors and bold commentators should obtrude their private opinions, and instil doubts into the minds of the youth." The true explanation, it is believed, is that which was suggested by another eminent Philadelphia lawyer. Mr. Samuel Dickson, to whom we have had the pleasure of listening to-day, in his interesting address at the opening session of this school eight years ago, pointed out that no public inconvenience was felt from the calling to the Bar of gentlemen who were incompetent or unwilling to practise. For the barristers being engaged, under the English custom, not by the clients, but by the attorneys or solicitors, who were themselves experienced in law, the ignorant or incompetent barristers had no chance of obtaining any business, and dropped out of sight. Furthermore, the concentration of the entire body of barristers in London, and the unrivalled honors and emoluments that reward the successful lawyer so developed competition and so stimulated the ambition of the ablest men, as inevitably to produce a Bench and Bar of the highest merit and distinction.

If we turn now to this country, we find a marked contrast with the English experience in legal education. To the College of William and Mary, in Virginia, belongs the distinction of having the earliest law professorship in the United States, a distinction due to the fertile genius of Jefferson, who, being appointed visitor to the college in 1779, wrote to a friend, in a tone of great satisfaction, that he had succeeded in abolishing the two professorships of divinity and substituting two others, one of medicine and one of law and police. Judge George Wythe, commonly known as Chancellor Wythe, was appointed professor, doubtless through the influence of Jefferson, who had been a pupil in his office. It is an interesting fact that John Marshall, as a student of the college, attended the first course of lectures given by the first American law professor.

Three similar professorships were established in the last century, at Philadelphia, New York, and Lexington, Ky. It seems probable that these professorships were created with the hope that they would soon expand into university schools of law. Such an inference derives support from the high character of the first incumbents. Professor Wythe was a distinguished judge of the high Court of Chancery of Virginia, Professor Wilson, at Philadelphia, was an Associate Justice of the Supreme Court of the United States, and both were signers of the Declaration of Independence. Professor Kent, though a young man when first appointed, already ranked as a lawyer of exceptional ability and legal learning. To these honored names should be added that of Henry Clay, who, although the fact seems to have escaped his biographers, was for two years professor of law at Transylvania University, being the youngest full law professor, as well as the youngest senator, in our country's history. But the hopes that may have been entertained of developing schools of law out of these professorships were in the main doomed to disappointment. The private law school at Litchfield had for nearly twenty-five years no competitor, and throughout the fifty years of its existence was the only school that could claim a national character.

The oldest of the now existing law schools in this country is the school at Cambridge, which was organized in 1817. But for the first dozen years of its existence, the Harvard School was a languishing local institution. I cannot better present to you the gloomy outlook for this school at that time than by quoting from Provost Duponceau. In an address before the Philadelphia Law Academy in 1821, he advocated earnestly the establishment in Philadelphia of a National School of Law, and after alluding to the law lectures at the University of Cambridge, added: "If that justly celebrated University were situated elsewhere than in one of the remote parts of our Union, there would be no need, perhaps, of looking to this city for the completion of the object which we have in view. Their own sagacity would suggest to them the necessity of appointing additional professors, and thus under their hands would gradually rise a noble temple dedicated to the study of our national jurisprudence. But their local situation precludes every such hope." Nor were the law schools of the University of Maryland, Yale, and the University of Virginia, which were established between 1824 and 1826, in any sense rivals of the Litchfield School. At the termination

of that famous private school in 1833, there were only about 150 students at seven university law schools. In the dozen years following, new schools were organized, and the school at Cambridge under the leadership of Story, in spite of its unfortunate situation, became a national institution. In 1850, when the Law School of the University of Pennsylvania was established by the auspicious election of Judge Sharswood as Professor of Law, our schools numbered fourteen, and in 1860 the number had risen to twenty-three, with a total attendance of about 1000 students, all but one of these schools forming a department of some university. In the thirty-five years since the Civil War more than eighty new schools have been organized, so that we have to-day 105 law schools, with an attendance of about 13,000 students. Twenty-five years ago in none of the schools did the course exceed two years. To-day, fifty of the schools have a three years' course. Nearly ninety of these schools are departments of a university.

Valuable as the lawyer's office is and must always be for learning the art of practice, these figures show how completely it has been superseded by the law school as a place for acquiring familiarity with the principles of law.

It is an interesting illustration of the law of evolution that we Americans, starting from radically different traditions of legal education, by a wholly independent process, without any imitation of continental ideas, have adopted in substance the continental practice of university legal training.

What is the significance for the future of this remarkable growth of law schools? It means, first of all, the opening of a new career in the legal profession, the career of the law professor. This is a very ancient career in countries in which the Civil Law prevails. In Germany, for instance, a young man upon completing his law studies at the university, determines whether he will be a practising lawyer, a judge, or professor, and shapes his subsequent course accordingly. The law faculties are, therefore, rarely recruited from either practising lawyers or judges. This custom will never, I trust, prevail in this country. Several of my colleagues at Cambridge think that a law faculty made up in about equal proportions of men appointed soon after receiving their law degree and of men appointed after an experience of from ten to twenty years in practice or upon the Bench would give the best obtainable results. I should be willing

to take the chances of a somewhat larger proportion of the younger men, if I believe them to have the making of eminent counselors or strong judges; and surely, men lacking these qualifications ought never to be thought of as permanent teachers in a first-class law school. The experience of the new law school at Leland Stanford University may fairly be expected to throw light on this problem. Next year, four of the five law professors in that school will be men who received their appointment within two years after taking their degree in law. They all graduated with distinction, and might look forward with confidence to a successful career at the Bar or on the Bench. I venture the prediction that this California school will ere-long be in the front rank of American law schools. One of their faculty told me that their ambition was to make the Stanford Law School better than the best Eastern law schools, and added, with commendable enthusiasm, that he believed they would succeed within twenty-five years. May God speed them to their goal!

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But whatever question there may be as to the just proportion in a law faculty of professors from the forum and from the university, there ought to be no doubt that the faculty should be made up almost wholly of men who devote the whole of their time to the university. The work of a law professor is strenuous enough to tax the energies of the most vigorous and demands an undivided allegiance.

At the present time about one fourth of the law professors of this country give themselves wholly to the duties of their professorships, while three fourths of them are active in practice or upon the Bench. These proportions ought to be, and are likely to be, reversed in the next generation. At the law schools of Harvard, Columbia, University of Virginia, Washington and Lee, Cornell, Stanford and as many more, nearly all the professors give themselves exclusively to the academic life. The University of Pennsylvania, I am confident, will not be long in joining this group. There are, of course, occasional instances of men of exceptional ability, facility, and capacity for work, and of such abundant loyalty — I need not go beyond the walls of this building for illustrations — from whom it is better to accept the half loaf that they are ready to give, than the whole loaf of the next best obtainable persons. There is always the hope, too, that such men may, sooner or later, cast in their lot for good and all with the university. But it is a sound general rule that

a law professorship should be regarded as a vocation and not as an avocation.

Of this vocation the paramount duty is, of course, that of teaching. Having mastered his subject, the professor must consider how best he can help the students to master it also. Different methods have prevailed at different times and places. At the Litchfield School, Judge Reeve and Judge Gould divided the law into forty-eight titles and prepared written lectures on these titles which they delivered, or rather dictated to the students, who took as accurate notes as possible, which they afterwards filled out and copied for preservation. A set of these notes, filling three quarto volumes of about five hundred pages each, was presented to the Harvard Law Library. The donor in his letter accompanying the gift wrote that these notes were so highly prized when he was a student at Litchfield that \$100 and upwards were frequently paid for a set. At a time when there were very few legal treatises, this plan of supplying the students with manuscript text-books served a useful purpose. But with the multiplication of printed treatises, instruction by the written lecture, which Judge Story, as far back as 1843, characterized as inadequate, has been rightly superseded. The recitation or text-book method was for many years the prevailing method, and is still much used. A certain number of pages in a given text-book are assigned to the students, which they are expected to read before coming to the lecture-room. The professor catechises them upon these pages, and comments upon them, criticising, amplifying and illustrating the text according to his judgment. In the hands of a master of exposition, who has also the gift of provoking discussion by putting hypothetical cases, this method will accomplish valuable results. But the fundamental criticism to be made upon the recitation method of instruction, as generally handled, is that it is not a virile system. It treats the student not as a man, but as a schoolboy reciting his lesson. Any young man who is old enough and clever enough to study law at all, is old enough to study it in the same spirit and the same manner in which a lawyer or judge seeks to arrive at the legal principle involved in an actual litigation. The notion that there is one law for the student and another law for the mature lawyer is pure fallacy. When thirty years ago Professor Langdell introduced the inductive method of studying law, it was my good fortune to be in his first class at the Harvard Law School,

so that we had an opportunity to compare his method with the recitation system. We were plunged into his collection of cases on Contracts, and were made to feel from the outset that we were his fellow students, all seeking to work out by discussion the true principle at the bottom of the cases. We very soon came to have definite convictions, which we were prepared to maintain stoutly on legal grounds, and we were possessed with a spirit of enthusiasm for our work in Contracts, which was sadly lacking in the other courses conducted on the recitation plan.

There are some very suggestive sentences in Lord Chief Baron Kelly's testimony before the Parliamentary Commission of 1855. He was giving his reasons, derived from his own experience, for setting a much higher value upon the experience in the chamber of a barrister or special pleader than upon courses of lectures. "Perhaps," he says, "there was too much copying. But there was also this — there were constant debates, there were constant investigations of every case that came into the barrister's or pleader's chambers for his opinion and looking up of cases; and then the students, each giving his own opinion upon the case, and saying why he formed that opinion, by referring to authorities; and then the barrister saying, my opinion is so and so, upon such and such grounds, correcting the errors of the one student, and approving of the course resorted to by the other. That was the way in which I learned the law, together with reading; and if I am to compel anybody to go through any course at all, it would be just that course." The Lord Chief Baron was exceptionally fortunate in his student experience. He was in truth at a private law school conducted on the sound principle of developing the student's powers of legal reasoning by continual discussion of the principles involved in actual cases. With the extinction of the special pleader there are few such schools left, even in London, and none at all in this country. One of my colleagues has said that if a lawyer's office were conducted purely in the interest of the student, and if, by some magician's power, the lawyer could command an unfailing supply of clients with all sorts of cases, and could so order the coming of these clients as one would arrange the topics of a scientific law-book, we should have the law-student's paradise. This fanciful suggestion was made with a view of showing how close an approximation to this dream of perfection we may actually make. If we cannot

summon at will the living clients, we can put at the service of the students, and in a place created and carried on especially for their benefit, the adjudicated cases of the multitude of clients who have had their day in court. We have only to turn to the reported instances of past litigation, and we may so arrange these cases by subjects and in the order of time as to enable us to trace the genesis and the development of legal doctrines. If it be the professor's object that his students shall be able to discriminate between the relevant and the irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar, in a word, that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases. These "constant debates" in the class have a further advantage. They make easy and natural the growth of the custom of private talks and discussions between professor and students outside of the lecture rooms. Any one who has watched the working of this custom knows how much it increases the usefulness of the professor and the effectiveness of the school.

But the field of the law-professor's activity is not limited to his relations with the students, either in or out of the classroom. His position gives him an exceptional opportunity to exert a wholesome influence upon the development of the law by his writings. If we turn to the countries in which the vocation of the law-professor has long been recognized, to Germany, for instance, we find a large body of legal literature, of a high quality, the best and the greater part of which is the work of professors. The names of Savigny, Windscheid, Ihering, and Brunner at once suggest themselves. These and many others are the lights of the legal profession in Germany. The influence of their opinions in the courts is as great or even greater than that of judicial precedents. Indeed, to our way of thinking, too much regard is paid to the opinion of writers and too little to judicial precedents, with the unfortunate result that the distinction of the continental judges is far less than that of the English judiciary. The members of the court do not deliver their opinions *seriatim*, nor does one judge deliver his written opinion as that of the court. The opinions are all what we call *per curiam* opinions. Furthermore, one may search the reports from cover to cover, and

not be able to find the number or the names of the judges who constitute the highest court in the German Empire.

But, while the Germans might well ponder upon the splendid record and position of the judges in England and in the best courts in this country, we, on the other hand, have much to learn from them in the matter of legal literature. Some of our law-books would rank with the best in any country, but as a class our treatises are distinctly poor. The explanation for this is to be found, I think, in the absence of a large professorial class. We now at last have such a class, and the opportunity for great achievements in legal authorship is most propitious. Doubtless no single book will ever win the success of the Commentaries of Blackstone or Kent. And no single professor will ever repeat the marvelous fecundity of Story, who, in the sixteen years of his professorship, being also all those years on the bench of the Supreme Court, wrote ten treatises of fourteen volumes, and thirteen revisions of these treatises. We live in the era of specialization, and the time has now come for the intensive cultivation of the field of law. The enormous increase in the variety and complexity of human relations, the multiplication of law reports, and the modern spirit of historical research, demand for the making of a first-class book on a single branch of the law an amount of time and thought that a judge or lawyer in active practice can almost never give. The professor, on the other hand, while dealing with his subject in the lecture-room, is working in the direct line of his intended book, and if he teaches by the method of discussion of reported cases, he has the best possible safeguard against unsound generalizations; for no ill-considered theory, no doctrinaire tendency can successfully run the gauntlet of keen questions from a body of alert and able young men encouraged and eager to get at the root of the matter. He has also in his successive classes the gratuitous services of a large number of unwitting collaborators. For every one who has ever written on a subject, which has been threshed out by such classroom discussion, will cordially agree with these words of the late Master of Balliol: "Such students are the wings of their teacher; they seem to know more than they ever learn; they clothe the bare and fragmentary thought in the brightness of their own mind. Their questions suggest new thoughts to him, and he appears to derive from them as much or more than he imparts to them."

Under these favoring conditions the next twenty-five years ought

to give us a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based upon scientific analysis. We may then expect an adequate history of our law supplementing the admirable beginning made by the monumental work of Pollock and Maitland.

But the chief value of this new order of legal literature will be found in its power to correct what I conceive to be the principal defect in the generally admirable work of the judges. It is the function of the law to work out in terms of legal principle the rules, which will give the utmost possible effect to the legitimate needs and purposes of men in their various activities. Too often the just expectations of men are thwarted by the action of the courts, a result largely due to taking a partial view of the subject, or to a failure to grasp the original development and true significance of the rule which is made the basis of the decision. Lord Holt's unfortunate controversy with the merchants of Lombard Street is a conspicuous instance of this sort of judicial error. When, again, the Exchequer Chamber denied the quality of negotiability to a note made payable to the treasurer for the time being of an unincorporated company, they defeated an admirable mercantile contrivance for avoiding the inconvenience of notes payable to an unchartered company or to a particular person as trustee. Both mistakes were due to a misconception of the true principle of negotiability and both were remedied by legislation. It would be difficult to find an established rule of law more repugnant to the views of business men or more vigorously condemned by the courts that apply it, than the rule that a creditor who accepts part of his debt in satisfaction of the whole, may safely disregard his agreement and collect the rest of the debt from his debtor. This unfortunate rule is the result of misunderstanding a *dictum* of Coke. In truth, Coke, in an overlooked case, declared in unmistakable terms the legal validity of the creditor's agreement. In suggesting these illustrations of occasional conflict between judicial decisions and the legitimate interests of merchants I would not be understood as reflecting upon the work of the judges. Far from it. The marvel is that in dealing with the many and varied problems that come before them, very often without any adequate help from the books, so few mistakes are made. From the nature of the case the judge cannot be expected to engage in original

historical investigations, nor can he approach the case before him from the point of view of one who has made a minute and comprehensive examination of the branch of the law of which the question to be decided forms a part. The judge is not and ought not to be a specialist. But it is his right, of which he has too long been deprived, to have the benefit of the conclusions of specialists or professors, whose writings represent years of study and reflection, and are illuminated by the light of history, analysis, and the comparison of the laws of different countries. The judge may or may not accept the conclusions of the professor, as he may accept or reject the arguments of counsel. But that the treatises of the professors will be of a quality to render invaluable service to the judge and that they are destined to exercise a great influence in the further development of our law, must be clear to every thoughtful lawyer.

It is the part of a professor, as well as of a judge, to enlarge his jurisdiction. Mention should, therefore, be made of the wholesome influence which the professor may exert as an expert counselor in legislation, either by staying or guiding the hand of the legislator.

The necessity of some legislation to supplement the work of the judges, and the wisdom of many statutory changes will be admitted by all. But the power of legislation is a dangerous weapon. Every lawyer can recall many instances of unintelligent, mischievous tampering with established rules of law. One of the worst of such instances is the provision in the New York Revised Statutes of 1828, which changed radically the rule against perpetuities, and which called forth Professor Gray's criticism "that in no civilized country is the making of a will so delicate an operation and so likely to fail of success as in New York." Equally severe criticism may be fairly made upon the revolutionary legislation in the same State, in 1830, in regard to the law of trust. This new legislation has produced several thousand reported cases and has given to New York a system of trusts of so provincial a character, that in the opinion of Mr. Chaplin, the author of a valuable work on trusts, the ordinary treatises on that subject are deprived of much of their value for local use. A part of this provincial system worked so disastrously, and caused, as Chief Justice Parker has said in a recent opinion, so many "wrecks of original charities — charities that were dear to the hearts of their would-be founders, and the

execution of which would have been of inestimable value to the public," that it was at last abolished and the English system of charitable trusts restored. No one will be so rash as to regard the law professor as a panacea against the evils of unwise legislation. But I know of no better safeguard against such evils than the existence of a permanent body of teachers devoting themselves year after year to the mastery of their respective subjects. Then again the spirit of codification is abroad. It is devoutly to be wished that this spirit may be held in check, until we have a body of legal literature resting upon sound generalizations. If, however, codification must come prematurely, it is the part of wisdom to bring to the work the best expert knowledge in the country. The commission to draft the code should be composed of competent judges, lawyers, and professors, and, in the case of commercial subjects, business men of wide experience. The draft of the proposed code should be published in a form easily accessible to any one, and the freest criticism through legal periodicals or otherwise should be invited during several years. In the light of this criticism the draft should then be amended and revised. In Germany, where by far the best of modern codification is to be found, these cardinal principles are followed as a matter of course. They were almost completely ignored, and with very unfortunate results, in the preparation of the Negotiable Instruments Act, adopted by several of our States. We should surely mend our ways in future codifications. In Germany much of the best work in the drafting of the code and of the criticism of the draft is done by the professors. There is no reason why under similar methods the same might not be true in this country.

This, then, is the threefold vocation of the law professor — teacher, writer, expert counselor in legislation. Surely, a career offering a wide scope for the most strenuous mental activity, a stimulus to the highest intellectual ambition, and gratifying in abundant measure the desire to render high service to one's fellow-men. If the professor renounces the joy of the arena, and the intellectual and moral glow of triumphant vindication of the right in the actual drama of life, he has the zest of the hunter in the pursuit of legal doctrines to their source, he has that delight, the highest of purely intellectual delights, which comes when, after many vigils, some original generalization, illuminating and simplifying the law,

first flashes through his brain, and, better than all, he has the constant inspiration of the belief that through the students that go forth from his teaching and by his writings, he may leave his impress for good upon that system of law which, as Lord Russell has well said, "is, take it for all in all, the noblest system of law the world has ever seen."

To those of us who believe that upon the maintenance and wise administration of this system of law rests more than upon any other support the stability of our government, it is a happy omen that so many centers of legal learning are developing at the universities all over our land. May the lawyers and the university authorities see to it that these law faculties are filled with picked men. Until the rural legislator has enlightened views of the value of intellectual service, we cannot hope to have on the bench so many of the ablest lawyers as ought to be there. But the universities, many of them at least, are not hampered by this difficulty. They have it in their power to add to the inherent attractiveness of the professor's chair such emoluments as will draw to the law faculty the best legal talent of the country. I have the faith to believe that at no distant day there will be at each of the leading university law schools a body of law professors of distinguished ability, of national and international influence. That the Law School of this University will have its place among the leaders is assured, beyond peradventure, by the dedication of this building. The lawyers of future generations, as they walk through these spacious halls, and see this rich library, and the reading-rooms thronged with young men working in the spirit of enthusiastic comradeship, will say: "Truly it was a noble nursery of justice and liberty that the lawyers and citizens of Philadelphia erected in 1900"—but as they call to mind the distinguished lawyers and judges among the alumni, and as they read over the names of the jurist-consults on the professorial staff, men teaching in the grand manner, and adding luster by their writings to the University and to the legal profession they shall add: "But those men of Philadelphia builded even better than they knew."

MUTUALITY IN SPECIFIC PERFORMANCE.¹

THE doctrine of mutuality² is stated as follows in Lord Justice Fry's Treatise on Specific Performance:³

"A contract to be specifically enforced by the court must, as a general rule, be mutual, — that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

And yet the truth of the following eight propositions, each one of which is at variance with the statement just quoted, will be generally admitted:

(1) A bilateral contract between a fiduciary and his principal is often enforced in favor of the principal, although not enforceable against him.

(2) A similar contract procured by the fraud or misrepresentation of one of the parties may be enforced against him, although not by him.

(3) In England, one who, after making a voluntary settlement, has entered into a contract to sell the settled property, may be compelled to convey, although he cannot force the buyer to accept a conveyance.

(4) A vendor, whose inability to make a perfect title debars him from obtaining a decree against the buyer, may in many cases be forced by the buyer to convey with compensation.

¹ Reprinted by permission from the *Columbia Law Review* for January, 1903.

² The historical development of the doctrine of mutuality is worked out with much ability by Professor Lewis in a series of essays in the *American Law Register*, 49 A. L. R. 270, 382, 445, 507, 559, and 50 A. L. R. 65, 251, 329, 523. The learned reader will find in these articles an exhaustive citation of authorities and much valuable discussion of particular cases.

³ Fry, *Sp. Perf.*, 3d ed., 215. See a similar statement in Pomeroy, *Sp. Perf.*, 2d ed., 229.

(5) Notwithstanding the opinions of Lord Redesdale and Chancellor Kent to the contrary, a party to a bilateral contract, who has signed a memorandum of it, may be compelled to perform it specifically, although he could not maintain a bill against the other party who had not signed such a memorandum.

(6) A contract between an infant and an adult may be enforced against the adult after the infant comes of age, although no decree could be made against the plaintiff.

(7) A plaintiff who has performed his part of the contract, although he could not have been compelled in equity to do so, may enforce specific performance by the defendant.

(8) One who has contracted to sell land not owned by him, and who, therefore, could not be cast in a decree, may, in many cases, by acquiring title before the time fixed for conveyance, compel the execution of the contract by the buyer.

Several of these propositions are treated by the learned author as exceptions to the general rule. But a rule so overloaded with exceptions is fairly open to this severe criticism by Professor Langdell:

"The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember."¹

If, however, we examine the actual cases in which a plaintiff failed to obtain specific performance of a contract solely on the ground that equity could not force him to perform his own counter-promise, we shall find that the underlying principle of the decisions is simple and just, easy to grasp and to carry in the mind, and one that may be expressed in few words without qualifying exceptions. This principle may be stated as follows: Equity will not compel specific performance by a defendant if, after performance, the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.

Let us test this principle, first by the groups of cases in which a plaintiff has failed to obtain specific performance, because no equitable relief could be obtained against him, and then by the groups of cases in which the plaintiff obtained a decree, although the defendant could not have got a decree against him.

A typical instance of the refusal of relief to the plaintiff, because of the defendant's inability to obtain the subsequent performance

¹ 1 *Harvard Law Review*, 104.

of the plaintiff's promise is furnished by the case of *Chadwick v. Chadwick*.¹ A mother agreed to convey certain land to her son, the latter agreeing to care for and support her in his home. A bill filed by the son praying for specific performance of the mother's agreement was dismissed, because the mother, after making the conveyance, could not obtain equitable relief against the son, contracts for personal service and the like not being enforceable in equity. As the court said of this contract:

"To compel its observance by one when its benefits could not be secured to [from] the other would be alike unequal and inequitable."

Vice-Chancellor Wigram stated the principle very clearly in *Waring v. Manchester Co.*:²

"The court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the court cannot give him, it certainly has been the generally understood rule that that is a case in which the court will not interfere."

But relief may be denied to a plaintiff, not only in cases in which the performance promised by him was to be subsequent to that of the defendant, but sometimes in cases where the reciprocal performance was to be contemporaneous. A case in point is *Flight v. Bolland*,³ the earliest and most frequently cited case in which the defense of lack of mutuality was sustained. An infant, who had entered into a bilateral contract with an adult, filed a bill through his next friend for its specific performance. The bill was dismissed, and quite properly. A decree against the defendant would have compelled him to surrender his property without any security for enjoying the equivalent for which he had stipulated. It is true that the decree would make the performance of the defendant conditional upon the plaintiff's performance. But the defendant could not count upon retaining the property actually conveyed to him. For the plaintiff, being still an infant, might avoid any conveyance

¹ (1898), 121 Ala. 580. See to the same effect *O'Brien v. Perry* (1900), 130 Cal. 526; *Ikerd v. Beavers* (1885), 106 Ind. 483.

² (1849), 7 Hare, 482, 492. The same idea is expressed by Wood, V. C., in *Stocker v. Wedderburn* (1857), 3 K. & J. 393, 404, and by Lord Cranworth in *Blackett v. Bates* (1865), 1 Ch. Ap. 117, 124, and in several of the cases cited in 1 Ames Cas. in Eq. Jur. 428, n. 2.

³ (1828), 4 Russ. 299.

or recover any money paid by him. That the decision proceeded on this ground is clear from Sir John Leach's remark: "The act of filing the bill by his next friend cannot bind him."¹

We may turn now to the eight groups of cases, already mentioned, in which the relief of specific performance is given to a plaintiff, although no decree would be given against him.

It is common learning that a fiduciary to sell cannot buy for himself and enforce the contract against his principal; and yet he may be compelled by the principal to take and pay for the property. Similarly a contract procured by fraud is enforceable against the fraudulent party, but not by him. It would be preposterous to permit the fiduciary, or fraudulent party, to defeat bills against him merely because of his inability, due to his own conduct, to maintain a bill against the principal or defrauded party. Nor does the rule operate unfairly against the fiduciary or fraudulent party, for the decree against him makes his payment concurrent with conveyance by the plaintiff.

The same reasoning applies to the case of a contract to sell land after one has made a voluntary settlement of it.²

The inability of a plaintiff to compel specific performance may be due not to his fault but to his misfortune. A vendor, for instance, with the best of intentions may find it impossible to make out a good title to all the property he has agreed to sell. He cannot, however, use his inability to obtain a decree against the buyer as a defense to a bill by the buyer against him. The buyer can compel him to convey and to receive a proportionally smaller amount of purchase money.³ Here, too, the seller receives at the time of conveyance a cash equivalent for it.

The most conspicuous instance of the breaking down of the sweeping doctrine of mutuality is furnished by the cases arising under the Statute of Frauds, in which a plaintiff, whose promise remains purely oral, is allowed to enforce performance of the counter promise of the defendant, who has signed a memorandum of it. Lord Redesdale was strongly opposed to granting relief in such

¹ See to the same effect *Solt v. Anderson*, 63 Neb. 734, 89 N. W. 306, 308; *Richards v. Green* (1872), 23 N. J. Eq. 536, 538; *Ten Eyck v. Manning* (1894), 52 N. J. Eq. 47, 51; *Tarr v. Scott* (1867), 4 Brewst. (Pa.) 49 (*semble*).

² *Smith v. Garland* (1817), 2 Mer. 123.

³ *Wilson v. Williams* (1857), 3 Jur. N. S. 810, and cases cited in 1 Ames Cas. in Eq. Jur. 251, n. 1.

cases.¹ Chancellor Kent, while deferring to authority, thought that the weight of argument was with Lord Redesdale.² His view seems to have prevailed in two jurisdictions.³ But it has been repudiated in England, Ireland, and in nearly all the states in this country.⁴ The prevailing view seems to be sound and just. The Statute of Frauds has made no change in the requisites of a contract. It simply furnishes a defense to the one whose undertaking is not manifested by a writing signed by him. If the defendant has not this statutory defense, and the plaintiff has it, it is because the plaintiff was prudent and the defendant careless. Furthermore, although the one who has the statutory defense cannot be compelled to perform as a defendant, he must perform, on his part, if he, as a plaintiff, insists upon performance by a defendant who cannot plead the statute.

A contract between an infant and an adult, as has been seen, cannot be enforced against the adult during the non-age of the infant. If, however, the bill is filed after the infant comes of age, the plaintiff should succeed, as he did succeed in *Clayton v. Ashdown*.⁵ The common law gives the infant a defense even after his majority, just as the Statute of Frauds gives the oral promisor a defense; but the adult, like the promisor who has signed a memorandum, has no defense. The objection that defeated the infant's bill in *Flight v. Bolland*⁶ cannot be urged against a bill filed after the infant is of age. The performance by the plaintiff concurrently with the defendant's performance cannot be avoided. The defendant will receive and may retain the stipulated equivalent for his own performance.

Lord Justice Fry in the passage already quoted defines mutual as meaning that the contract must be "such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them." In accordance with this definition a contract to convey land in consideration of a promise to render personal services before the time appointed for conveyance would not be mutual, and a conveyance could not be compelled even after

¹ *Lawrenson v. Butler* (1803), 1 Sch. & Lef. 13, 20.

² *Clason v. Bailey* (1817), 14 Johns. 484, 489.

³ *Lipscomb v. Watrous* (1894), 3 Dist. Col. Ap. 1; *Duvall v. Myers* (1850), 2 Md. Ch. 401.

⁴ The authorities are collected in 1 Ames Cas. in Eq. Jur. 421, n. 1.

⁵ (1715), 9 Vin. Abr. 393 (G. 4), 2.

⁶ *Supra*.

the plaintiff had rendered the services, because he could not have been forced to render them at the time of the contract made. And yet the authorities are unanimous that a plaintiff, who has rendered such services or performed any other consideration for the conveyance, which equity would not have compelled him to perform, may compel the defendant to convey.¹ Such a result was inevitable. It would be shockingly unjust, if a defendant, who had received the promised equivalent for his conveyance, were permitted to withhold it. It is for this reason that the doctrine of mutuality is inapplicable to unilateral simple contracts.²

If both parties at the time of the execution of the bargain must have the right to resort to equity for its specific performance, a vendor, who, at the time of the bargain, has not the property which he agrees to sell, cannot by subsequently acquiring it compel the buyer to complete the purchase. There are a few decisions and *dicta* to this effect.³ But Mr. Justice Wells, delivering the opinion of the court in *Dresel v. Jordan*,⁴ said in regard to this conception of mutuality:

"We do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able in season to comply with its requirements on his part, to make good the title he has agreed to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

And this view is supported by an overwhelming weight of authority.⁵ The prevailing view is just. Indeed, if the buyer knew

¹ *Wilkinson v. Clements* (1872), 8 Ch. 96; *Lane v. May Co.* (1898), 121 Ala. 296; *Thurber v. Meves* (1897), 119 Cal. 35; *Lindsay v. Warnock* (1893), 93 Ga. 619; *Denlar v. Hile* (1889), 123 Ind. 68; *Allen v. Cerro Gordo Co.* (1875), 40 Iowa, 349; *Topeka Co. v. Root* (1896), 56 Kan. 187.

² *Howe v. Watson* (1902), 179 Mass. 30, and cases cited in 1 Ames Cas. in Eq. Jur. 430, n. 3.

³ *Norris v. Fox* (1891), 45 Fed. 406; *Luse v. Deitz* (1877), 46 Iowa, 205; *Ten Eyck v. Manning* (1893), 52 N. J. Eq. 47, 51; *Chilhowie v. Gardiner* (1884), 79 Va. 305 (*semble*).

⁴ (1870), 104 Mass. 407.

⁵ *Langford v. Pitt* (1731), 2 P. Wms. 629; *Hoggart v. Scott* (1830), 1 R. & My. 293; *Murrell v. Goodyear* (1860), 1 D. F. & J. 432; *Hepburn v. Dunlop* (1816), 1 Wheat. 179; *Mason v. Caldwell* (1848), 10 Ill. 196, 208, 209; *Brumfield v. Palmer* (1844), 7 Blackf. 227, 230; *Guild v. R. R. Co.* (1896), 57 Kan. 70; *Logan v. Bull* (1880), 78 Ky. 607, 618; *Md. Co. v. Kuper* (1900), 90 Md. 529; *Luckett v. Williamson* (1866), 37 Mo. 388; *Oakey v. Cook* (1886), 41 N. J. Eq. 350; *Bruce v. Tilson* (1862), 25 N. Y.

at the time of the bargain that the seller did not own the land bargained for, a rule which permitted him to refuse to accept a good title subsequently acquired and tendered at the appointed day, simply because the seller did not have the title when the contract was made, would be a mockery of justice. Nor is there any unfairness in a decree against a buyer who was unaware of the seller's lack of title until after the latter had acquired it. If, indeed, a buyer who contracted in the belief that the seller had the title, discovers before the time for completion of the contract that the seller had not the title at the time of the bargain, and has not since acquired it, he is justified, according to several authorities, in saying to the seller: "I shall not complete."¹ He bargained for what he believed to be a certainty, and it would not be fair to keep him in suspense, against his will and contrary to his reasonable expectation, while the seller endeavors, without any certainty of success, to procure the title from some third person. But if he does not declare the bargain off at once, he may be forced to complete it.²

It is evident, from a consideration of the eight classes of cases just discussed, that the rule of mutuality, as commonly expressed, is inaccurate and misleading. The reciprocity of remedy required is not the right of each party to the contract to maintain a bill for specific performance against the other, but simply the right of one party to refuse to perform, unless performance by the other is given or assured.

The soundness of this conception of mutuality is confirmed by certain cases in which specific performance is accomplished by an injunction restraining a threatened breach of the contract. The manager of a theatre, for example, has engaged a distinguished actor to act for him and not to act for any other manager during a certain period. Although the actor cannot compel specific perform-

194; *Jenkins v. Fahey* (1878), 73 N. Y. 355; *Westall v. Austin* (1844), 5 Ired. Eq. 1; *Kindley v. Gray* (1845), 6 Ired. 445; *Wilson v. Tappan* (1856), 6 Oh. 272; *Mumseman's Ap.*, (1870) 65 Pa. 480, (1872) 71 Pa. 465; *Lyles v. Kirkpatrick* (1876), 9 S. Car. 265; *Fraker v. Brazleton* (1883), 12 Lea, 278; *Tison v. Smith* (1852), 8 Tex. 147; *Reeves v. Dickey* (1853), 10 Gratt. 138; *Core v. Wigner* (1889), 32 W. Va. 277.

¹ *Forrer v. Nash* (1865), 35 Beav. 167; *Brewer v. Broadwood* (1882), 22 Ch. D. 105; *Wylson v. Dunn* (1887), 34 Ch. D. 569, 577; *Bellamy v. Debenham* (1891), 1 Ch. 412.

² *Hoggart v. Scott* (1830), 1 R. & My. 293; *Salisbury v. Hatcher* (1842), 2 Y. & C. C. 54.

ance of the manager's agreement to employ him and pay him his salary, the manager may enforce the actor's negative agreement not to act at any other theatre.¹ But the actor is not obliged to perform this negative agreement without reciprocity of performance on the part of the manager. As was well said by Wood, V. C., in *Stocker v. Wedderburn*² "where a person is ordered by injunction to perform a negative covenant of that kind, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which cover the consideration for the negative covenant, the injunction would be dissolved."³

All the contracts thus far considered have been bilateral contracts, or unilateral contracts in which the defendant received the full *quid pro quo* at the moment the contract arose. It is believed, however, that equity would properly enforce the performance of some unilateral contracts, although the defendant at the time of bill filed had received no part of the expected equivalent for his undertaking. Suppose, for example, that one should contract under seal with a married woman to buy for a certain price a certain piece of land belonging to her. Apart from statutes the promise of a married woman would be a nullity. But if she and her husband should file a bill for specific performance, tendering a deed, so executed as to convey her interest in the land, a decree in her favor would be eminently just. For the defendant, though having no right to compel performance by the woman, if forced to pay the purchase money, would receive at the same time a conveyance of the land and so obtain the full benefit of his bargain. No case precisely like this has been found. But there are several decisions, not essentially distinguishable, in which a defendant who had covenanted with both husband and wife for the purchase of her land was compelled to complete the purchase, although the wife's agreement to convey was altogether void.⁴

¹ *Lumley v. Wagner* (1851), 1 D. M. & G. 93, and cases cited in 1 Ames Cas. in Eq. Jur. 102, n. 1.

² (1857), 3 K. & J. 393, 404.

³ A recognition of the principle stated by Wood, V. C., would have led to a different result in *Hills v. Croll* (1845), 2 Ph. 60. But that case was discredited in *Catt v. Tourle* (1869), L. R. 4 Ch. 654, 660, 662, and *Singer Co. v. Union Co.* (1872), Holmes, 253, 257. See also the Reporter's note in 2 Ph. 62.

⁴ *Fennelly v. Anderson* (1850), 1 Ir. Ch. R. 1; *Chamberlin v. Robertson* (1871), 31 Iowa, 408 (*semble*); *Logan v. Bull* (1880), 78 Ky. 607; *Freeman v. Stokes* (1877), 12 Phila. 219 (*semble*); but see *Tarr v. Scott*, *supra*, *semble contra*; *Jarnigan v. Levisy*

When an option to purchase land is given and accepted, the acceptance is, in most cases, fairly to be interpreted as the giving of a counter promise, so that the resulting bargain is like any other bilateral contract for the sale and purchase of land.¹ But the option may be granted in such a form as to admit of acceptance without any counter obligation. One promises, for instance, under seal or in consideration of one dollar, to convey a certain piece of land to A., upon A.'s paying, without any obligation to pay, \$1,000 therefor within a month. Here the obligation is purely unilateral from beginning to end. If, however, the obligor refuses to accept the money when duly tendered, on no sound equitable principle can he resist A.'s bill for specific performance. He has made a valid contract, he did not contemplate a counter obligation, and a decree against him will secure to him the purchase money, the expected equivalent for his undertaking. *Borel v. Mead*,² in which the plaintiff was successful, seems to have been such a case.

The doctrine of mutuality has been thought by some judges to apply to contracts containing an option of quite a different kind from the options just considered, namely, to options to terminate a contract. *Rust v. Conrad*³ is a case in point. The defendants, landowners, in consideration of the plaintiff's making successful explorations for iron ore upon the lands of the former during the next six months agreed to execute to them a twenty years' lease of the lands. By the terms of the contemplated lease the lessees were to prosecute mining operations diligently, and to pay certain royalties. They were also to have the option of terminating the lease upon thirty days' notice. Because of this option the court dismissed a bill against the landowners for the execution of the lease. The reasoning of the court is far from convincing. There was thought to be an impropriety in giving a decree for the plaintiffs, the benefit of which they might subsequently see fit to renounce. It would seem that such a contingency might safely be left to take care of itself. At all events

(1880), 6 Lea, 397; *Mullens v. Big Creek Co.* (Tenn., 1895), 35 S. W. R. 439; *Hoover v. Calhoun* (1861), 16 Gratt. 109, 112 (*semble*). See, however, an adverse criticism in Fry, Sp. Perf., 3d ed., 217.

¹ The surprising mass of litigation arising from the attempts, invariably unsuccessful, of grantors of options to resist bills for specific performance, can be explained only by the widespread confusion in the minds of lawyers as to the true significance of the doctrine of mutuality. The cases are collected in 1 Ames Cas. in Eq. Jur. 431, n. 2.

² (1884), 3 N. Mex. 84.

³ (1881), 47 Mich. 449.

it hardly lies in the mouth of the defendant to resist performance because the plaintiff may sometime decide to renounce the benefit of such performance. One feels the less hesitation in criticising this decision, because it was subsequently superseded by a statute giving specific performance against landowners in such cases.¹ There are a few *dicta* in accordance with the Michigan decision.² But there is authority as well as reason on the other side. LOWELL, J., puts the matter very convincingly in *Singer Co. v. Union Co.*:³ "It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable."

The doctrine of the Michigan decision was expressly repudiated in a recent Pennsylvania case, *Philadelphia Club v. Lajoie*.⁴

In all the cases thus far discussed in this paper it was the defendant who invoked the doctrine of mutuality in order to bar the specific performance of his promise, which by its nature was such as to justify equitable relief. But there are instances of suits by a seller against a buyer, in which the plaintiff, pressed by the argument that his remedy at law was adequate, has appealed, and with success, to the principle of mutuality to support his prayer for equitable relief. The contrast between these two doctrines is obvious. In the one

¹ In *Grummett v. Gingrass* (1889), 77 Mich. 369, 389, the court adopted these words of one of the counsel: "The legislature could do no less. Nearly all the iron mines of the Upper Peninsula have been discovered by explorers — poor men who would be cheated out of their discoveries unless ample means were provided for compelling the landowners to live up to their agreements. An action at law for damages would be entirely illusory, and the result would be that the development of the mineral wealth of the Upper Peninsula would be retarded, if the law, as laid down by the Supreme Court (in *Rust v. Conrad*), had not been changed by the legislature."

² *Marble Co. v. Ripley* (1869), 10 Wall. 339, 359 (but see *Telegraph Co. v. Harrison* (1891), 145 U. S. 459); *Brooklyn Club v. McGuire* (1902), 116 Fed. 782, 783; *Iron Co. v. Western Co.* (1888), 83 Ala. 408, 509; *Sturgis v. Galindo* (1881), 59 Cal. 28, 31; *Harrisburg Club v. Athletic Assn.* (1890), 8 Pa. Co. Ct. R. 337, 342.

³ (1872), Holmes, 253.

⁴ 202 Pa. 210, 51 Atl. 973. The court referring to *Rust v. Conrad* said, p. 220: "We are not satisfied with the reasoning intended to support that conclusion. We cannot agree that mutuality of remedy requires that each party should have precisely the same remedy, either in form, effect, or extent. In a fair and reasonable contract it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon."

case the defendant says to the plaintiff: "You must renounce your equitable claim, because I have no adequate equitable relief against you." In the other case the plaintiff says to the defendant: "Since you may enforce your equitable claim against me I must have the right to proceed in equity on my legal claim against you."

In truth the vendor's right to specific performance has nothing to do with any question of mutuality. The vendor, from the time of the bargain, holds the legal title as a security for the payment of the purchase money, and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption. This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor, just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common-law creditor. No case has been found in which a bill has been sustained under such circumstances. The case of *Jones v. Newhall*¹ is a solid decision against such a bill. A lessee, to put another illustration, may compel an execution of a lease, but will anyone maintain that a lessor, who has executed a lease, may collect the rent by a bill in equity? We may dismiss this phase of the doctrine of mutuality from our minds.

It is hoped, too, that the preceding discussion of the cases will have proved the need of revising the common form of stating the principle of mutuality, and the propriety of adopting the form here suggested: Equity will not compel specific performance by a defendant, if after performance the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.

¹ (1874), 115 Mass. 244.

SPECIFIC PERFORMANCE FOR AND AGAINST STRANGERS TO THE CONTRACT.¹

GIVEN a contract which, from its nature, warrants a decree for its specific performance by the promisor at the suit of the promisee, under what circumstances may its performance be compelled either by persons other than the promisee, or against persons other than the promisor?

The typical agreement justifying the relief of specific performance is the agreement for the sale and purchase of land. It is often said that such an agreement makes the seller a trustee for the buyer. But the relation between these parties is quite different from the ordinary trust relation. The seller retains the legal title as a security for the payment of the purchase-money. Subject to this incumbrance and to the reservation of rents and profits up to the time fixed for conveyance, in case the seller keeps possession also, the equitable interest is in the buyer. In other words the real relation of the buyer and seller is analogous to that of a mortgagor and mortgagee in a mortgage created, as in the modern English practice, by an absolute conveyance on the part of the mortgagor, and an agreement to reconvey, on payment of the loan, on the part of the mortgagee. The reports are full of statements to this effect.² One of the most pointed is Judge TURLEY's remark in *Graham v. McCampbell*:³ "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt." It goes without saying that a mortgagor, or his assignee, may redeem the land and compel a reconveyance from any grantee of the mortgage, unless the title has vested in a purchaser for value without notice of the mortgage, and that any assignee of the mortgagor has the same right. In like manner the buyer or any assignee, immediate or remote, of the buyer's rights may redeem the land and compel a conveyance from the seller, or from any as-

¹ Reprinted by permission from the *Harvard Law Review* for January, 1904, with manuscript additions by the author.

² See Ames, *Cas. in Eq. Jur.* 240 n.

³ Meigs, 52, 55.

Besides the agreement to transfer property there are some other affirmative agreements touching a particular *res*, of which equity will compel specific performance. A grantor, for instance, may require the grantee of land to build thereon, in fulfilment of his promise given as a part of the consideration for the conveyance.¹ But the rights and duties of third persons, growing out of such a promise are widely different from those of assignees of promisors in promises to convey property. The promise to build being made, as a rule, to the promisee, not as an individual, but as an occupant of land in the neighborhood, the benefit of the promise is not transferable generally to such person as the promisee may designate, but only to some subsequent occupant of the promisee's land.² Nor is the burden of such a promise transferable to any one, even to a purchaser from the promisor with notice of the promise.³

Such purchaser, by refusing to build, does not retain for himself any *res* which ought to go to the promisee. His only benefit is the avoidance of a possibly unprofitable expenditure of money. Nor does this benefit to him imply an unjust pecuniary loss to the promisee. For the latter still has his right to compensation for the promisor's breach of contract. If the promisor is solvent, the promisee will lose nothing; and even if the promisor is insolvent, the promisee's loss, like that of the other creditors, is simply the consequence of misplaced confidence in the pecuniary ability of the common debtor. Moreover, it is precisely the same loss that would have befallen him if the promisor had kept the land. So long as this is true, there is obviously no reason why equity should impose upon the promisor's assignee the constructive duty of ful-

¹ *Storer v. Gt. West. Co.*, 2 Y. & C. C. C. 48; *Mayor v. Emmons* (1901), 1 K. B. 515, and cases cited in 1 Ames, Cas. Eq. Jur. 78, n. 1.

² Doubtless in some cases the benefit of the promise is not assignable at all, being intended to enure to the advantage of the promisee alone or to the good of the public. *Austenberry v. Corporation*, 29 Ch. Div. 750.

³ *Haywood v. Brunswick Society*, 8 Q. B. Div. 403; *London Co. v. Gomm*, 20 Ch. Div. 562, 583 (*semble*); *Andrew v. Aitken*, 22 Ch. Div. 218 (*semble*); *Austenberry v. Corporation*, 29 Ch. Div. 750 (overruling *Cooke v. Chilcott*, 3 Ch. D. 694, invalidating *Holmes v. Buckley*, 1 Eq. Ab. 27, and explaining *Morland v. Cook*, 6 Eq. 252); *Hall v. Ewin*, 37 Ch. Div. 74; *Clegg v. Hands*, 44 Ch. D. 503, 519.

But see *Gilmer v. Mobile Co.*, 79 Ala. 569; *Whittenton v. Staples*, 164 Mass. 319; *Countryman v. Deck*, 13 Abb. N. C. 110; *R. R. Co. v. R. R. Co.*, 171 Pa. 284; *Lydick v. Baltimore Co.*, 17 W. Va. 427.

filling the latter's promise, and thereby shift the loss from the promisee, who willingly took the risk of the promisor's solvency, to the assignee, who gave no credit.

If we turn now to negative agreements restricting the use of property, we shall find that the cases in which equity will grant its relief by specific performance in favor of or against strangers to the contract, fall into two classes. The first includes covenants that run at law with the land or the reversion, in which cases the equitable relief is concurrent with the legal remedy. The second includes agreements, whether under seal or by parol, enforceable at law only by and against the immediate parties, in which cases, therefore, the jurisdiction of equity in favor of or against third persons is exclusive.

The rule as to the first class of cases is simple and uniformly recognized. If, from the nature of the covenant, the covenantee has the option of proceeding at law for damages or in equity for specific performance by means of an injunction, this same option may be exercised by any third person entitled to sue, and against any third person liable to be sued at common law.¹

In the second class of cases there is not complete harmony in the decisions; nor in the courts, which agree in their decisions, is there a consensus of opinion as to the *ratio decidendi*. It will be convenient first to state the result of these decisions as to the persons subject to the burden of these agreements; as to the persons entitled to the benefit of them; as to the nature of the restrictions, of which the benefit and the burden pass to third persons; and as to the kind of *res*, to which such restrictions attach; and then to discuss the general principle to be deduced from the decisions.

To maintain a common law action upon covenants running with the land at law privity of estate between the covenantor and the defendant is essential. But no such privity is necessary in suits against persons chargeable only in equity. The burden of the restrictive agreement, unless expressly limited to the covenantor,² falls upon every possessor of the *res* except a purchaser for value without notice of the agreement, or a possessor subsequent to such *bona fide* purchaser. Accordingly relief by injunction will be granted not only against the covenantor's assignee,³ but against

¹ Clegg v. Hands, 44 Ch. Div. 503.

² Re Fawcett, 42 Ch. D. 150.

³ Tulk v. Moxhay, 2 Ph. 774, and cases cited in Ames, Cas. Eq. Jur. 149, n. 1.

his lessee,¹ against an occupant,² and also, it is believed, although no case in point has been found, against a disseisor.³

A purchaser for value without notice of the agreement takes the *res* free from the restrictive agreement.⁴ The promisee and the innocent purchaser are equally meritorious persons, and one of them must suffer by the wrongful conduct of the transferor. But in this instance, as in other cases of equal equities, the court leaves the parties where it finds them. To incumber the *res* in the hands of the innocent purchaser for the benefit of the promisee would be to rob Peter to pay Paul. The situation is altogether different, if the *res* is acquired with notice of the restrictive agreement, or by a volunteer. If such a possessor were permitted to ignore the restrictive agreement, he would make an unmerited profit, and this profit would entail an undeserved loss upon the promisee. For the promisee in negative agreements, unlike the promisee in affirmative agreements, has no redress against the promisor.⁵ The latter did not violate the restrictive agreement while he was in possession of the *res*, and its violation by a subsequent possessor is no breach of contract by the promisor.

What persons, if any, other than the promisee may enforce com-

¹ John Brothers Co. v. Holmes (1900), 1 Ch. 188; Holloway v. Hill (1902), 2 Ch. 612, and cases cited in 1 Ames, Cas. Eq. Jur. 152, n. 1.

² Mander v. Falcke (1891), 2 Ch. 554.

³ *Re Nisbit*, [1906] 1 Ch. 386, affirming [1905] 1 Ch. 391, *acc.* See a criticism of this case in 51 Sol. J. 141, 155.

⁴ Carter v. Williams, 9 Eq. 678; Nottingham Co. v. Butler, 16 Q. B. Div. 778, 787, 788; Rowell v. Satchell (1903), 2 Ch. 212; Washburn v. Miller, 117 Mass. 376; Moller v. Presbyterian Hospital, 65 N. Y. App. Div. 134, and cases cited in 1 Ames, Cas. Eq. Jur. 173, n. 1. There is a casual statement by JESSEL, M. R., in London Co. v. Gomm, 20 Ch. D. 562, 583, that a *bona fide* purchaser of an equitable estate would take subject to the burden of a restrictive agreement, and this *dictum* has received the extrajudicial approval of COLLINS, L. J., in Rogers v. Hosegood (1900), 2 Ch. 388, 405, and FARWELL, J., in Osborne v. Bradley (1903), 2 Ch. 446, 451, and of ROMER, L. J. in *Re Nisbit*, [1906] 1 Ch. 386, 405. It is difficult, however, to see either the justice or the legal principle upon which the *bona fide* purchaser of an equitable fee-simple should be less entitled to exception from the burden of the restrictive agreement than the innocent purchaser of a legal fee-simple. These *dicta* of the English judges are deservedly criticised in a recent article in the Solicitors' Journal (47 Sol. J. 793).

⁵ Clements v. Welles, L. R., 1 Eq. 200; Feilden v. Slober, 7 Eq. 523; Evans v. Davis, 10 Ch. D. 747, 764; Patman v. Harland, 17 Ch. D. 353; Hall v. Ewin, 37 Ch. D. 74. But see *Re Poole*, [1904] 2 Ch. (C. A.) 173. These cases show only that equity will not issue an injunction against a covenantor no longer in possession. He cannot control the occupant. But he is liable for breach of covenant.

pliance with restrictive agreements, depends wholly upon the intention of the parties to the agreement. Frequently the parties intend that the restriction upon the promisor's land shall be for the benefit of the promisee as owner of neighboring land and of any subsequent possessor of the whole or any part of the promisee's land. This is the case when a tract of land is divided into building lots to be sold under a general scheme by which certain restrictions are to apply to each lot for the benefit of every other lot into whosoever hands they may come. Privity of estate between the promisee and the plaintiff is not essential to the enforcement of these restrictions. The benefit of the agreement passes not only to an assignee,¹ but also to a lessee² of the assignor, and probably to a subsequent possessor, who is a mere occupier.³ Sometimes it is the intention of the parties that the restriction upon the promisor's land shall benefit third parties already in possession of neighboring land at the time of the promise. Accordingly, if the owner of land sells it in lots to different purchasers, but subject to the same restrictions, the prior purchaser of one lot may enforce the restrictive agreement of the later purchaser of another lot.⁴ Similarly, a promise of the purchaser of lot 1 from A., a trustee for B., not to erect any building which would obstruct the view from the house on the adjoining lot 2, owned by B. in his own right, is enforceable by B.⁵

If the restrictive agreement is intended for the benefit of the promisee alone, by adding to his comfort and enjoyment in the occupancy of his neighboring land, no other possessors can enforce the agreement.⁶

¹ *Rogers v. Hosegood* (1900), 2 Ch. 388; *Nottingham Co. v. Butler*, 16 Q. B. Div. 778; *Parker v. Nightingale*, 6 All. 341; *DeGray v. Monmouth Co.*, 50 N. J. Eq. 329; *Tallmadge v. East Bank*, 26 N. Y. 105, and cases cited in 1 *Ames, Cas. Eq. Jur.* 172, n. 1, 180, n. 1.

² *Taite v. Gosling*, 11 Ch. D. 273.

³ Presumably equity would not enforce the restriction at the suit of a dissee, but would grant an injunction on a bill filed by the dissee.

⁴ *Renals v. Cowlshaw*, 9 Ch. D. 125, 128 (*semble*); *Nottingham Co. v. Butler*, 16 Q. B. Div. 778, 784 (*semble*); *Collins v. Castle*, 36 Ch. D. 243; *Hopkins v. Smith*, 162 Mass. 444; *DeGray v. Monmouth Co.*, 50 N. J. Eq. 329, 335; *Barrow v. Richard*, 8 Paige, 351; *Brouwer v. Jones*, 23 Barb. 153.

⁵ *Gilbert v. Peteler*, 38 N. Y. 165.

⁶ *Keates v. Lyon*, 4 Ch. 218; *Sheppard v. Gilmore*, 57 L. J. Ch. 6; *Osborne v. Bradley* (1903), 2 Ch. 446; *Formby v. Barker* (1903), 2 Ch. 539; *Badger v. Boardman*, 16 Gray, 559; *Sharp v. Ropes*, 110 Mass. 381; *Clapp v. Wilder*, 176 Mass. 332;

Intermediate between the intention to benefit every possessor in the occupancy of the neighboring land, and the intention to enhance the enjoyment of the promisee's occupancy alone, we find in the much approved judgment of *HALL, V. C.*, in *Renals v. Cowlshaw*¹ the suggestion of still another possible intention, namely, the intention to benefit the promisee, not only as an occupant, but also as a future seller, by giving him the power, if he chooses to exercise it by an actual assignment of the agreement, of transferring the same benefits to any or all of his vendees. In such a case, therefore, a subsequent possessor, in order to enforce the restriction, must prove two distinct assignments by the promisee, an assignment of the land and an assignment of the contract.² The instances must be rare in which a promisor, willing to give the promisee the power of transferring the benefit of the agreement, would care whether the power were exercised by a double assignment of land and agreement or by the mere assignment of the land. Nor is it easy to see why this distinction should be of value to the promisee. For if the agreement be interpreted in the wider sense as intended to give the benefit to the promisee and any assignee of the land as such, a promisee, wishing under exceptional circumstances to convey the land without the benefit, could easily release the restriction as to the land about to be conveyed. It may be doubted, too, whether in *Renals v. Cowlshaw* and the other English cases, in which assignees of the land were denied the benefit of the restrictions because there was no actual assignment of the agreement also, the evidence was sufficient to prove any intention to require the double assignment. On very similar facts in several American cases the court decided that the benefit was intended to pass to any assignee of the land.³

It might be supposed that all restrictions upon the use of land

Helmley v. Marlborough Co., 62 N. J. Eq. 164, 63 N. J. Eq. 799; *McNichol v. Townsend*, 73 N. J. Eq. 276, 70 At. R. 965; *Equitable Co. v. Brennan*, 148 N. Y. 661. See also *Kemp v. Bird*, 5 Ch. Div. 974; *Ashby v. Wilson*, (1900) 1 Ch. 66, in which cases the restrictive agreements of a subsequent lessee of A. were unenforceable by a prior lessee of A.

¹ 9 Ch. Div. 125, 11 Ch. Div. 866.

² See, in accordance with this view of *HALL, V. C.*, *Master v. Hansard*, 4 Ch. Div. 718; *Nalder v. Harman*, 82 L. T. Rep. 594; *Spicer v. Martin*, 14 App. Cas. 12, 24; *Rogers v. Hosegood* (1900), 2 Ch. 388, 408.

³ *Peck v. Conway*, 119 Mass. 546; *Post v. West*, 115 N. Y. 361; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Hulshizer*, 163 Pa. 643.

which are enforceable as between the parties to the agreement would be equally effective in favor of and against third persons, within the rules already stated. In some jurisdictions, however, relief for or against strangers to the agreement is limited to those restrictions which make for greater pleasure or comfort in the occupation of the neighboring land. Agreements of the promisor not to use his land in competition with his neighbor, according to the decisions and *dicta* in a few States, are of value only as between promisor and promisee.¹ But the weight of authority is in favor of the opposite and, as it seems to the writer, the better opinion.² If A. may sell his land to B. for a larger price because of his agreement not to use land that he retains in competition with B.'s use of the land purchased, and if this is a valid agreement as between A. and B., it seems a highly unjust doctrine that permits A. to sell, and C., although a purchaser with notice, to buy the land freed from the restriction, and gives B. no remedy against either A. or C.

The *res*, to which the benefit and burden of restrictive agreements attach, is commonly land. But it may be personal property. In the familiar case of the sale of a business with an agreement by the seller not to engage in the same business within a certain distance, the benefit of the agreement passes to a subsequent assignee of the business.³ An instance of the burden of a restriction passing to the assignee of personalty is found in a recent New York case.⁴ The owner of the copyright of a book upon the sale of one set of electrotypes plates of the book to the plaintiff, agreed not to sell copies of the book printed from another set of plates below a certain price, and this agreement was enforced by an injunction against the defendant, a subsequent purchaser of the copyright with notice of the restriction.

¹ Taylor v. Owen, 2 Blackf. 310 (*semble*); Norcross v. James, 140 Mass. 188; Kettle Ry. v. Eastern Ry., 41 Minn. 461 (*semble*); Brewer v. Marshall, 19 N. J. Eq. 537 (four of twelve judges dissenting); Tardy v. Creasy, 81 Va. 553 (two of five judges dissenting).

² Holloway v. Hill (1902), 2 Ch. 612; Robinson v. Webb, 68 Ala. 393, 77 Ala. 176; McMahon v. Williams, 79 Ala. 288; Frye v. Partridge, 82 Ill. 267; Watrous v. Allen, 57 Mich. 362; Hodge v. Sloan, 107 N. Y. 244 (two judges dissenting); Stines v. Dorman, 25 Oh. St. 580; Middletown v. Newport Hospital, 16 R. I. 319, 333 (*semble*).

³ Benwell v. Innes, 24 Beav. 307; Fleckenstein v. Fleckenstein, 66 N. J. Eq. 252, 53 Atl. R. 1043; Francisco v. Smith, 143 N. Y. 488, and cases cited in 1 Ames, Cas. Eq. Jur. 187, n. 1.

⁴ Murphy v. Christian Association, 38 N. Y. App. Div. 426. See also N. Y. Co. v. Hamilton, 28 N. Y. App. Div. 411.

The uncertainty as to the true legal principle of the decisions upon the passing of the benefit and burden of restrictive agreements is evident from the statement by JESSEL, M. R., as late as 1882, that the doctrine of *Tulk v. Moxhay*,¹ a leading case on the subject, appeared to him to be "either an extension in equity of Spencer's² Case to another line of cases, or else an extension in equity of the doctrine of negative easements."³ Subsequent judgments in England have made no choice between the alternatives suggested by the Master of the Rolls. On the other hand many American courts have countenanced the supposed analogy between restrictive agreements and negative easements.⁴ But the courts of New Jersey have rejected this analogy,⁵ and, it is submitted, they were right in so doing. There is, it is true, a certain superficial resemblance between restrictive agreements and negative easements. Two estates are essential to the passing of the benefit and burden of each.⁶ But the differences between them are fundamental. An easement is an obligation between two estates. This relation is indicated by the common terms dominant and servient estates. Because the one is obligee and the other obligor, the relation continues the same into whosoever hands one or both estates may successively pass, and, except for Registry Acts, whether the subsequent owners bought with or without notice. This cannot be said of restrictive agreements. The burden vanishes as soon as the land subject to the restriction comes to the hands of a purchaser for value without notice of the restriction. Moreover the burden by the intention of the parties may be limited at the outset to the original promisor.⁷ The benefit too, if such is the understanding of the parties to the promise, may be limited to the promisee,⁸ or in England, to the promisee and subsequent occupant of the promisee's land by express assignment of

¹ 2 Ph. 774.

² 5 Rep. 16.

³ London Co. v. Gomm, 20 Ch. Div. 562, 583.

⁴ "The reservation creates an easement, or servitude in the nature of an easement." Per MORTON, J., in *Peck v. Conway*, 119 Mass. 546. See similar statements in *Webb v. Robbins*, 77 Ala. 176, 183; *Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510, 515; *Trustees v. Lynch*, 70 N. Y. 440, 446, 447, 448, 449, 450; *Wetmore v. Bruce*, 118 N. Y. 318, 322.

⁵ *Brewer v. Marshall*, 19 N. J. Eq. 537, 543; *DeGray v. Monmouth Co.*, 50 N. J. Eq. 329, 339.

⁶ Gale, Easements (74) 10; *Formby v. Barker* (1903), 2 Ch. 539.

⁷ *Re Fawcett*, 42 Ch. D. 150.

⁸ *Supra*, 386 and n. 6.

the contract.¹ The analogy of the negative easement is objectionable for the further reason that easements are confined to real property, but restrictive agreements apply equally to personal property.²

Nor is the doctrine of restrictive agreements illuminated by the suggested analogy to the doctrine of Spencer's Case. Upon covenants running with the land assignees are bound, without regard to notice, or absence of value, whereas notice, or the absence of value, is the very foundation of the subsequent possessor's liability on restrictive agreements. Nor does the doctrine of Spencer's Case apply to personal property.

In truth, the passing of the benefit and burden of restrictive agreements is not to be explained by any single analogy or principle. The imposition of the burden upon others than the promisor and the acquisition of the benefit by others than the promisee are the results of two very different principles.

The burden is imposed upon a subsequent possessor of the *res*, whether real or personal, upon the same principle that the grantee of a guilty trustee, or the grantee of one already under contract to sell the *res* to another, is bound to convey the *res* to the *cestui que trust* or prior buyer. In all three cases there would be the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the *cestui que trust* or promisee by ignoring the trust, the promise to convey, or the restrictive agreement. Equity, therefore, in all three cases imposes upon the grantee a constructive duty coextensive with the express duty of his grantor.

The right of third persons to the benefit of restrictive agreements is the result of the equally just and equally simple principle, that equity will compel the promisor to perform his agreement according to its tenor. If the restrictive agreement, fairly interpreted, was intended for the sole benefit of the promisee, only he can enforce it. If on the other hand it was intended for the benefit of the occupant or occupants of adjoining lands, then such occupant or occupants may compel its specific performance. It is to be observed that a grantee of the promisee acquires his rights not as assignee of the restrictive contract, but as assignee of the promisee's land. Accordingly the assignee of the land is none the

¹ *Supra*, 386, 387, n. 1.

² *Supra*, 388.

less entitled to the benefit of the agreement, although there was no assignment of the contract,¹ or even although he was ignorant of its existence when he acquired the land.² The assignee's situation in this respect is closely analogous to the rights of the buyer of land from one to whom it had been previously sold with warranty. The last buyer enforces the warranty of the first seller not as assignee of the warranty, but as assignee of the land, for that is the meaning of the warrantor's undertaking. The analogy between the restrictive agreement and a warranty holds also in other respects. As the assignee of the land may sue upon the warranty in his own name without joining the warrantee,³ so the subsequent possessor of the neighboring land may, as sole plaintiff, file his bill for an injunction against the promisor.⁴ A warrantee, who has conveyed the land to another, can no longer enforce the warranty;⁵ in like manner a promisee who has parted with all of his land in the neighborhood loses the right to enforce the restrictive agreement.⁶ A release of the warranty by the warrantee after his conveyance to another is inoperative;⁷ a release of the restrictive agreement by the promisee after parting with his land in the neighborhood is likewise of no effect as to the land conveyed by him.⁸ A *bona fide* purchaser from the warrantee acquires the warranty free from any equitable defenses good against the warrantee;⁹

¹ Peck v. Conway, 119 Mass. 546; Phoenix Co. v. Continental Co., 87 N. Y. 400, 408.

² Rogers v. Hosegood (1900), 2 Ch. 388, 406.

³ Wyman v. Ballard, 12 Mass. 304; Withy v. Mumford, 5 Cow. 137; Wilson v. Taylor, 9 Oh. St. 595. See also Noke v. Awdler, Cro. El. 373, 486; Lewis v. Campbell, 8 Taunt. 715.

⁴ Western v. Macdermott, 2 Ch. App. 72.

⁵ Keith v. Day, 15 Vt. 660; Smith v. Perry, 26 Vt. 279. If the warrantee gave an independent warranty to his vendee he may sue the original warrantor after indemnifying his own vendee, but not otherwise. Green v. Jones, 6 M. & W. 656; Wheeler v. Sohler, 3 Cush. 219; Markland v. Crump, 1 Dev. & B. 94.

⁶ Dana v. Wentworth, 111 Mass. 291; Keates v. Lyon, 4 Ch. 218; Trustees v. Lynch, 70 N. Y. 440, 451; Barron v. Richard, 3 Edw. Ch. 96, 101.

⁷ Littlefield v. Getchell, 32 Me. 390 (*semble*); Chase v. Weston, 12 N. H. 413. See also Harper v. Bird, T. Jones, 102. The *dictum contra* in Middlemore v. Goodale, Cro. Car. 503, may be disregarded.

⁸ Eastwood v. Lever, 4 D. J. & S. 114, 126; Western v. Macdermott, L. R. 1 Eq. 499, 506; Rowell v. Satchell (1903), 2 Ch. 212; Hopkins v. Smith, 162 Mass. 444; Couderd v. Sayre, 46 N. J. Eq. 386, 396; Waters v. Collins, (N. J. Eq.), 70 At. R. 984; Hills v. Miller, 3 Paige, 254.

⁹ Ill. Co. v. Bonner, 91 Ill. 114; Hunt v. Owing, 17 B. Mon. 73; Alexander v. Schreiber, 13 Mo. 271; Suydam v. Jones, 10 Wend. 180; Greenvault v. Davis, 4 Hill, 643; Kellogg v. Wood, 5 Paige, 578, 616.

it is believed that an innocent purchaser from the promisee should be allowed to enforce performance of a restrictive agreement, although the promisors might have defeated a suit by the promisee on the ground of fraud or by reason of some other equitable defense. But no case has been found involving this question.

These qualities, common to the warranty and the restrictive agreement, indicate that they both belong in the same class with bills and notes. For the holder of a bill or note sues in his own name, acquires his right, not as assignee of a *chose in action*, but as the *persona designata* within the tenor of the instrument, and, if a *bona fide* purchaser, holds free from equities and equitable defenses. If the right to enforce restrictive agreements were limited to assignees of the land, in privity of estate with the promisees, they, like assignees of a warranty, would be assimilated to indorseees of a bill or note payable to order. The restrictive agreement, however, is frequently intended to enure to the benefit of any possessor subsequent to the promisee,¹ or even to one who acquired the promisee's land before the making of the promise.² In such cases the true analogue of the restrictive agreement is the note payable to bearer. The principle is clearly stated by EMOTT, J., in *Brouwer v. Jones*,³ in which case a prior grantee of one part of a tract of land was allowed to enforce the restrictive covenant of a later grantee of another part of the same tract: "I am unable to see in what respect the relative dates of the conveyances of Brouwer and Mason [the common grantors] can make any difference. Every such covenant, in every deed given by them, was intended not only for their benefit but also for that of all their prior as well as subsequent grantees. . . . This court may, therefore, very properly be asked to interpose in behalf of any of the owners of the lots, as being parties for whose benefit the covenants were made."

¹ *Supra*, 385, 386.

² *Supra*, 386 and n. 4.

³ 23 Barb. 153, 162. See the similar statement of Chancellor WALWORTH in *Barrow v. Richard*, 8 Paige, 351.

FORGED TRANSFERS OF STOCK.¹

THE Supreme Court of Massachusetts decided, in *Boston Co. v. Richardson*,² that one who surrendered a share-certificate bearing a forged transfer, and obtained in exchange a new certificate, must not only return the new certificate but also pay damages to the company, although he bought the old certificate from his transferor and received the new one from the company in ignorance of the forgery. This liability of the innocent purchaser was based upon his implied representation or warranty of title, the court finding an analogy between the presentment of the certificate to the company for the purpose of substituting the purchaser in the place of the former registered shareholder, and the transfer of a certificate to a third person by way of sale. In an article upon "*The Doctrine of Price v. Neal*," in a previous volume of the Review,³ the present writer questioned the soundness of this analogy. He agreed that, as between the company and the innocent purchaser, the loss, to the extent of the value of the shares, must fall upon the purchaser,⁴ but maintained that this resulted not from any obligation *ex contractu* to the company, but indirectly from his liability *ex delicto* to the registered owner, whose signature had been forged. The argument was as follows: The assumption of dominion over the certificate by the purchaser, who claimed under the forged transfer, however honest his conduct, was a plain conversion. The registered owner, therefore, had an election of remedies. He might sue the innocent purchaser in trover, or he might ignore the purchaser and assert his unchanged rights as a shareholder against the company. If he collected the value of the shares from the innocent purchaser, that was practically the end of the matter. He could not, after receiving the equivalent of the shares from the converter, claim also the shares themselves as against the company. By electing to get satisfaction from the converter he determined his right

¹ Reprinted by permission from the Harvard Law Review for June, 1904.

² 135 Mass. 473.

³ 4 Harvard Law Review, 297.

⁴ This was the result in *Brown v. Howard Co.*, 42 Md. 384, and *Metropolitan Bank v. Mayor*, 63 Md. 6.

against the company. The converter, therefore, after satisfying the judgment against him, would succeed to the rights of the former owner of the shares. But the loss rests upon him, for he has paid twice for the shares.

If, on the other hand, the former owner, instead of proceeding against the converter, elected to claim reinstatement as shareholder upon the books of the company, the claim against the converter was not extinguished. He was still bound to make satisfaction for his tort, but the owner of the converted certificate, electing to continue the *dominus* of the shares, could not collect for his own benefit from the converter. On principles of obvious justice he must hold the claim against the converter as a constructive trustee for the benefit of the company. It is on the same principle that one who has received the amount of a loss by fire from an insurance company holds for the benefit of the company a claim against a third person, who wilfully or negligently caused the destruction of the property insured. In any event, therefore, and quite independently of any doctrine of representation or warranty, the innocent purchaser and not the company must be the victim of the forged transfer. Similar reasoning, it was suggested, explained why the loss must, in any event, fall upon the innocent purchaser of a bill, claiming under a forged indorsement, even though it might have been paid to him.

Convincing as this reasoning was to the writer, he was unable to find any decisions upon forged transfers of stock which supported it. Recently, however, the Court of Appeal in England, in *Sheffield Corporation v. Barclay*,¹ declared, reversing the decision of LORD ALVERSTONE, C. J.,² that one who presented a forged deed of transfer of shares to a company for the purpose of being registered as a shareholder made no representation as to the genuineness of the transfer and was not liable to the company either upon a contract of indemnity or upon a warranty.

In an article upon "Forged Transfers of Stock and the Sheffield Case," which appeared in the April number of the current volume of the Review, this decision of the English Court of Appeal is criticised adversely, not only for its *ratio decidendi*, but also for its supposed inconsistency with the decision of the same court in *Oliver v. Bank of England*,³ and with the affirming decision of the

¹ (1903) 2 K. B. 580.

² (1903) 1 K. B. 1.

³ (1902) 1 Ch. 610.

House of Lords in the same case, *sub nom.* *Starkey v. Bank of England*.¹ Although recognizing, as every reader must recognize, the clearness and force with which this criticism is expressed, the present writer finds it impossible to agree with the learned critic upon either of his grounds of objection to the English decision, and he is moved, accordingly, to suggest certain distinctions and analogies which, it is hoped, may be helpful in bringing about a correct determination of the rights and liabilities growing out of forged transfers of stock.

We may consider first the alleged inconsistency of the two English decisions. Obviously the Court of Appeal in the *Sheffield Case* was unconscious of any change of front or of any disregard of the controlling judgment of the House of Lords in *Starkey's Case*. That case was cited in the *Sheffield Case* by the defendant's counsel and distinguished by the counsel for the plaintiff, but is not mentioned in any of the three judgments of the Lords Justices. Doubtless these judges shared the declared opinion of LORD ALVERSTONE,² whose judgment they reversed, that *Starkey's Case* was irrelevant to the question then before the court. An examination of the facts of the two cases, it is conceived, justifies this opinion.

In *Starkey's Case* the controversy related to consols, the transfer of which must be made at the Bank of England, and is executed, not by an officer of the Bank, but by the transferor in person, or by his duly authorized attorney. *Starkey*, a broker, having received a power of attorney to sell and transfer shares belonging to F. W. Oliver and E. Oliver, which purported to be signed by both, whereas E. Oliver's signature was forged by F. W. Oliver, went to the Bank, produced the power of attorney, signed the demand to act³ indorsed on the power, and executed as "attorney"⁴ the transfer to the purchaser in the books of the Bank,⁵ the Bank permitting him to act for Oliver as the latter's agent. On these facts it was decided that the case was governed by the familiar doctrine of *Collen v. Wright*,⁶ that one who purports to act as the agent of another in dealing with a third person warrants that he has authority so to act.⁷

¹ (1903) A. C. 114.

² (1903) 1 K. B. 18.

³ "I demand to act by this letter of attorney." (1902) 1 Ch. 611.

⁴ (1902) 1 Ch. 612.

⁵ (1902) 1 Ch. 629.

⁶ 8 E. & B. 647.

⁷ COZENS-HARDY, L. J., suggested (1902), 1 Ch. 616, another principle upon which

In the *Sheffield Case*, on the other hand, the subject of transfer to Barclay, the innocent purchaser, was stock of the Corporation of Sheffield. Such stock is transferable only by a deed of transfer, a separate instrument from the certificates, which may or may not be delivered with the deed.¹ The grantee sends the deed to the corporation with a request for registration and the issue of a new certificate to him or his nominee, and the corporation is under a duty to the registered owner to register all genuine transfers made by him. This course was pursued in the *Sheffield Case*, but, unfortunately, the deed of transfer to Barclay was forged.

The difference between the two English cases is sufficiently clear. The transfer on the books in favor of Barclay was not the act of the former owner, or of his attorney, as it was in *Starkey's Case*, but the act of the corporation. Barclay, unlike *Starkey*, did not purport to the corporation to be acting as the agent of the registered owner, but for himself. When he sent the deed of transfer for registration, he presented what purported to be an order upon the corporation from the registered owner to substitute the grantee in his place as shareholder, just as the holder of a bill presents to the drawee what purports to be the order of the drawer to pay to the holder the amount of the bill. Confessedly the holder of a bill makes no representation or warranty that the signature of the drawer is not forged. It is difficult to see any distinguishing circumstances in the *Sheffield Case*, which justify the implication of any representation or warranty of the genuineness of the deed, that is, the order of transfer. The holder of the bill and the holder of the order of transfer are not in the attitude of sellers, who, of course, do warrant their title. On the contrary, they are calling upon the drawee and the corporation, respectively, to do their duty and to decide for themselves, and at their peril, the extent of their duty. They say in effect, "I hold a bill, or an order of transfer of stock, which I believe to be genuine, and which by its tenor directs you to pay me so much money, or to register me as shareholder. Obey or disobey this direction as you see fit, and at your own risk, what-

the Bank might charge *Starkey*: "Would the brokers (*Starkey & Co.*) have any answer to an action by the plaintiff (*Oliver*) to recover the purchase money of the stock (sold by *Starkey & Co.* to others)? And, if so, ought not the Bank, who have paid the plaintiff, to be subrogated to his right against the brokers?" This suggestion seems to be sound.

¹ They were not delivered to Barclay. (1903) 2 K. B. 590.

ever be your decision." This analogy between the position of Barclay and the holder of a bill upon which the drawer's signature was forged, was pointed out by VAUGHAN WILLIAMS, L. J.¹ The learned critic of the Sheffield Case characterizes the rule founded on *Price v. Neal*,² which protects the holder who has received payment of a bill on which the drawer's signature was forged, as anomalous. This seems hardly the adjective to apply to a rule which prevails throughout the British Empire, almost everywhere in the United States, and all over the continent of Europe. A rule so universal must be based upon a fundamental principle of justice. This principle may be stated as follows: If one of two innocent persons must suffer by the misconduct of a third, and their claims in point of natural justice are equally meritorious, the law will not intervene between them to shift the loss from one to the other. The continental decisions in cases like *Price v. Neal* are put clearly upon this principle, which was also, as it seems to the writer, the paramount reason for LORD MANSFIELD's judgment in this leading English case.³

It may be asked why the forged transfer in the Sheffield Case is not like the forged indorsement of a bill, in which case, as is well known, the innocent purchaser claiming under the forged indorsement must lose even if he has collected the bill, the law compelling him to refund the money.⁴ Or, to put the question in another form, why is not the reasoning in the opening paragraphs of this article, by which the innocent purchaser of the share certificate, bearing a forged transfer, must suffer the loss to the extent of the value of the shares in cases like the Massachusetts case of *Boston Co. v. Richardson*,⁵ equally cogent to the prejudice of Barclay in the Sheffield Case.

The answer is simple. The analogy fails between the Sheffield

¹ (1903) 2 K. B. 590. LINDLEY, J., pointed out the same analogy in *Simm v. Anglo-American Co.*, 5 Q. B. D. 196.

² 3 Burr. 1354.

³ Unfortunately LORD MANSFIELD gave as another reason for his judgment the duty of the drawee to know the drawer's signature. The learned reader will find in 4 *Harvard Law Review*, 297, a statement of the writer's reasons for believing that the inability of the drawee to recover in cases like *Price v. Neal* does not depend upon any artificial theory of negligence nor upon the fictitious presumption that he knows the signature of the drawer.

⁴ See cases cited in 4 *Harvard Law Review*, 307, n. 3.

⁵ 135 Mass. 473.

Case and the forged indorsement of a bill and between that case and the Massachusetts case, because Barclay, unlike the innocent purchaser of the bill or certificate, was not guilty of a conversion of any document belonging to the person whose signature was forged. The latter's share-certificate was not delivered to Barclay.¹ Since, then, the true owner of the shares had no money claim against him, the corporation could not charge him indirectly by the principle of subrogation.²

¹ (1903) 2 K. B. 590.

² Had Barclay retained the new certificate he might have been compelled to surrender it, not because he had gained it by a tort, but simply in order to protect the corporation. In spite of the registration in his favor, he was not in truth a shareholder, and the new certificate was therefore merely a representation, which could not operate as an estoppel in his favor, for he had not changed his position upon the faith of it, but which would charge the corporation by way of estoppel in favor of a *bona fide* purchaser, to whom Barclay might transfer it. Such a transfer, if made by Barclay after knowledge of the forgery, would be wrongful, and the corporation would be entitled, on the principle of *quia timet*, to the surrender of this document, of no value to Barclay and a possible source of mischief to the corporation. The corporation was also interested in having the outstanding certificates correspond to the registration of shareholders on its books.

HOW FAR AN ACT MAY BE A TORT BECAUSE OF THE WRONGFUL MOTIVE OF THE ACTOR.¹

As a precedent *Allen v. Flood*² has been made harmless by the later decision in *Quinn v. Leatham*.³ But certain *dicta* in the prevailing judgments in the earlier case, by reason of the prominence of the judges who gave them, may have a considerable and, as it seems to the present writer, a mischievous influence. He ventures, therefore, to point out what he conceives to be the fallacy of two of the most important of these *dicta*.

The first is this remark of LORD WATSON:⁴

"Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong." The other is a statement by LORD MACNAGHTEN:⁵ "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

In opposition to these generalizations, the true rule, it is submitted, may be formulated as follows: The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage;

¹ Reprinted by permission from the *Harvard Law Review* for April, 1905, with manuscript additions by the author.

² (1898) A. C. 1.

³ (1901) A. C. 495.

⁴ (1898) A. C. 92.

⁵ (1898) A. C. 151.

and the question whether there was or was not just cause will depend, in many cases, but not in all, upon the motive of the actor.

The motive to an act being the ultimate purpose of the actor is rightful if that purpose be the benefit of others or of himself, wrongful if the purpose be damage to another. An act may be a tort, notwithstanding the rightful motive of the actor, because the end does not justify the means. Such torts, however, are beyond the scope of the present paper. The soundness of the *dicta* quoted from *Allen v. Flood* must be tested by cases in which the actor in wilfully causing damage to another was dominated by a wrongful motive. We shall find that these cases fall into three groups: (1) Cases in which the wrongful motive has no legal significance, the actor, by general judicial opinion, being subject to no liability at law, however severe the judgment against him in the forum of morals; (2) Cases which have divided judicial opinion, some courts deciding that the actor should be charged because of his wrongful motive, others ruling that he should not be charged, notwithstanding his wrongful motive; (3) Cases in which it is generally agreed that the actor should be charged because of his wrongful motive.

First group. A defendant who has caused damage to the plaintiff and been actuated in so doing by the most reprehensible motives escapes liability if the plaintiff is suffering only the consequences of his own breach of duty. For example, the plaintiff refuses to leave the defendant's house, when requested, whereupon the defendant puts him out by force;¹ or the defendant removes the plaintiff's encroaching fence;² or his wrongful obstruction to the flow of a stream;³ or turns the plaintiff's trespassing horse into the highway where it is lost or stolen.⁴ It makes no difference that the defendant, in doing these acts, was taking advantage of the opportunity to gratify a vindictive spirit, and would not have done them otherwise. It is still true that he was merely putting an end to the plaintiff's tort. Similarly, a creditor pursues his debtor with all the rigor of the law in order to ruin him, although he knows that with some indulgence he would realize more himself and enable

¹ *Oakes v. Wood*, 2 M. & W. 791, 794, per PARKE, B.; *Kiff v. Youmans*, 86 N. Y. 324 (*semble*); *Brothers v. Morris*, 49 Vt. 460.

² *Smith v. Johnson*, 76 Pa. St. 191.

³ *Clinton v. Myers*, 46 N. Y. 511.

⁴ *Humphrey v. Douglass*, 11 Vt. 22.

his debtor to avoid bankruptcy;¹ or in a spirit of malevolence he sues a trespasser.² Here again the malevolent motive of the defendant is legally of no significance. The debtor and the tortfeasor were legally bound to pay and cannot claim damages because they were brought into court for the breach of their duty.³ The action is refused in these cases, notwithstanding the reprehensible motive of the defendant, because the court could not without stultifying itself punish him for enforcing his absolute legal rights against his debtor or the wrongdoer.

In other cases the wrongful motive of the actor is ignored for a different reason. An English judge said from the bench to one of the parties: "You are a harpy, preying on the vitals of the poor." It was admitted that the words were false and spoken for the sole purpose of injuring the person addressed. The latter brought an action against the judge, but was unsuccessful.⁴ A witness gave perjured testimony for the sake of defeating one of the parties to the suit. There was no redress against him at the suit of the person injured by his perjury.⁵ It is believed to be for the public interest that neither judge, juror, party, counsel, nor witness should be called to account in a civil action for words spoken while filling those characters. The same absolute privilege extends to speeches in legislative assemblies.⁶

Anyone may speak or write defamatory words of another, and in the most contemptible spirit of vindictiveness, if he simply tells the truth. This rule works very harshly sometimes, but it is thought

¹ *Morris v. Tuthill*, 72 N. Y. 573; *Friel v. Plummer*, 69 N. H. 498; *South Bank v. Suffolk Bank*, 27 Vt. 505; *Randall v. Hazelton*, 12 All. 412, 415, per COLT, J.; *Anthes v. Schroeder*, 74 Neb. 172.

² *Jacobson v. Von Boenig*, 48 Neb. 80.

³ BARON PARKE'S oft-quoted *dictum* (*Stevenson v. Newnham*, 13 C. B. 285, 297): "An act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent" was given in a similar case. The defendant was sued for maliciously distraining for more rent than was due. But the count did not allege that the distress was excessive, that is, was unreasonably large for the rent actually due. If the defendant took by distress no more goods than might properly be taken, his motive in taking them was irrelevant. *Hamilton v. Windolf*, 36 Md. 301, is a similar case.

⁴ *Scott v. Stansfeld*, L. R. 3 Ex. 220.

⁵ *Dampont v. Simpson*, Cro. El. 520.

⁶ The head of an executive department of the government enjoys a similar immunity from a civil action for his official conduct. *Spalding v. Vilas*, 161 U. S. 483. Nor will an action lie for a malevolent removal of a subordinate official by a superior invested with the power of removal. *Rosenbaum v. Gillian*, 101 Mo. App. 126.

to be for the public welfare that men should appear in their true colors.¹

An innocent man is subjected to a criminal prosecution by one who acted from the purest malevolence. Nevertheless, if he had reasonable grounds for believing the party prosecuted to be guilty, no action will lie against him for his malevolent conduct.² Here, again, the interest of the private individual must give way to the public good. It is for the interest of the community that all persons believed on reasonable grounds to be criminals should be prosecuted, whatever the motive of the person instigating the prosecution. In all these cases and others that might be mentioned the defendant escapes liability, not from any regard for him, but by reason of the paramount consideration of the public welfare.

Second group. There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. The typical illustrations of such conduct are the sinking of a well by the owner, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or the erection by the owner on his land, but near the boundary, of an abnormally high fence, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct the view. In England it seems to be settled that the owner may act in this malevolent manner with impunity.³ In France and Germany the owner is liable in tort in each case.⁴ In this country there is a strange inconsistency in the reported decisions. In thirteen of the fifteen jurisdictions in which the question has arisen the courts have declared that the

¹ Odgers, *Lib. & Sl.*, 3d ed., 202. See the analogous case of *Lancaster v. Ham-burger*, 70 Oh. St. 156, 71 N. E. Rep. 289. By statute in Delaware, Florida, Illinois, Louisiana, Maine, Massachusetts, Nebraska, New York, Rhode Island, West Virginia, and possibly in a few other States, the truth of a libel is no defense to an action, unless it was published with a proper motive.

² *Foshay v. Ferguson*, 2 Den. 617; 1 Ames & Smith, *Cas. on Torts*, 548, 549, n. 1.

³ *Mayor v. Pickles* (1895), A. C. 587; *Capital Bank v. Henty*, 7 App. Cas. 741, 766.

⁴ *Draining of spring*: *Badoit v. Andre*, Cour de Lyon, April 18, 1856, Dalloz, 56, 2, 199; *Barré v. Guilhaumon*, Cour de Montpellier, July 16, 1866, Sirey, 67, 2, 115 (*semble*); *Forissier v. Chavrot*, Cour de Cassation, June 10, 1902, Sirey, 1903, 1, 11; G. v. F., O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch. No. 273 (*semble*). *Spite fence*: *Doerr v. Keller*, Cour de Colmar, May 2, 1855, Dalloz, 56, 2, 9; G. v. F., O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch. No. 273 (*semble*); *Marcus v. Bose*, O. L. G. zu Darmstadt, June 5, 1882, 37 Seuff. Arch. No. 292 (*semble*).

malevolent draining of a neighbor's spring is a tort.¹ On the other hand in six of the ten States in which actions have been brought for the malevolent erection of a spite fence, the opinion of the court was against the plaintiff.²

That the conduct of the defendants in these cases is unconscionable no will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our States the courts have allowed reparation, and from the further fact that in at least six³ States statutes have been passed making the erection of spite fences a tort.⁴ Such legislation is

¹ *Katz v. Walkinshaw*, 141 Cal. 116; *Cohen v. La Canada Co.*, 142 Cal. 437; *Roath v. Driscoll*, 20 Conn. 533, 540, 543, 544; *Barclay v. Abraham*, 121 Ia. 619; *Gagnon v. French Co.*, 163 Ind. 687, 72 N. E. Rep. 849; *Chesley v. King*, 74 Me. 164; *Stevens v. Kelley*, 78 Me. 445, 452; *Greenleaf v. Francis*, 18 Pick. 117, 119 (*semble*; but see *Walker v. Cronin*, 107 Mass. 555, 564, and *Plant v. Woods*, 176 Mass. 492, 499); *Stillwater Co. v. Farmer*, 89 Minn. 58; *Springfield Co. v. Jenkins*, 62 Mo. Ap. 74; *Bassett v. Salisbury Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, 447; *Franklin v. Durgee*, 71 N. H. 186; *Smith v. Brooklyn*, 18 N. Y. Ap. Div. 340, 160 N. Y. 357, 361; *Forbell v. New York*, 164 N. Y. 522; *Wyandot Co. v. Sells*, 3 Oh. N. P. 210 (question left open in earlier case in Supreme Court, *Frazier v. Brown*, 12 Oh. St. 299, 303, 304); *Wheatley v. Baugh*, 25 Pa. St. 528, 533; *Lybe's App.*, 106 Pa. St. 626, 632; *Williams v. Ladew*, 161 Pa. St. 283, 287, 288; *Miller v. Blackrock Co.*, 99 Va. 747 (*semble*). The only decisions to the contrary are in Vermont and Wisconsin. *Chatfield v. Wilson*, 28 Vt. 49; *Huber v. Merkel*, 117 Wis. 355.

² *Russell v. State*, 32 Ind. Ap. 243, 69 N. E. Rep. 482; *Bordeau v. Greene*, 22 Mont. 255; *Brostrom v. Lampp*, 179 Mass. 315; *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Auburn Co. v. Douglas*, 9 N. Y. 447, 450 (*semble*); *Adler v. Parr*, 34 N. Y. Misc. Rep. 482; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Letts v. Kessler*, 54 Oh. St. 73 (reversing s. c. 7 Oh. C. C. 108); *Metzger v. Hochreim*, 107 Wis. 267. The opposite view obtains in Michigan, New Hampshire, Oklahoma, and Pennsylvania. *Burke v. Smith*, 69 Mich. 380; *Flaherty v. Moran*, 81 Mich. 52; *Kirkwood v. Finegan*, 95 Mich. 543; *Horan v. Byrnes*, 72 N. H. 93; *Smith v. Speed*, 11 Okla. 95; *Haverslick v. Byrnes*, 33 Pa. St. 368 (*semble*).

³ Connecticut, Maine, Massachusetts, New Hampshire, Vermont, and Washington. There is a similar statute in Wisconsin against the malevolent draining of a neighbor's spring.

⁴ The courts which deny compensation for the damage inflicted by a spite fence proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. But there are many limitations upon the right of ownership at common law, and, it is submitted, there is no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbor. If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute? Such a statute was held unconstitutional in *Huber v. Merkel*, 117 Wis. 355. See also *Western*

likely to spread, so that ultimately the cases in this second group will belong in the third group.¹

Third group. Coming now to the cases in which an actor's liability for intentional damage to another is determined by the motive with which he acted, let us take first the case of malicious prosecution. The plaintiff, an innocent man, has been subjected to a criminal prosecution for theft. The defendant, who instituted the prosecution, although having no reasonable ground for his belief, did honestly believe the plaintiff to be guilty of the theft. Is the defendant liable for the damage suffered by the plaintiff? If he acted from a sense of public duty to bring a supposed criminal to justice, then, blunderer though he was, his conduct is justifiable. If, on the other hand, his object was to punish the plaintiff for marrying the woman whom he himself had hoped to make his wife, or to satisfy some other grudge, his conduct was inexcusable. Here, certainly, the motive or object of the actor converts an act otherwise lawful into a tort. We may suppose again that a defendant publishes a fair and accurate report of a judicial proceeding which contains matters defamatory to the plaintiff, a minister. If this is done simply by way of giving news to the public, the plaintiff has no remedy. He has to suffer for the general good of the community. If, however, the defendant, solely from ill-will to the plaintiff, should print the report for the purpose of discrediting the plaintiff as a candidate for a call to a certain church, the plaintiff could charge him in tort for the damage caused by the publication.² Here also it is the defendant's motive or object which makes him a wrongdoer.

Co. v. Knickerbocker, 103 Cal. 111, 115. But the opposite view was taken in *Rideout v. Knox*, 148 Mass. 368, and *Karasek v. Peier*, 22 Wash. 419.

¹ The discontinuance of a service at will or the refusal to employ a man, to make a lease to him, to buy his goods, to lend him money, to recommend him as a servant, will give him no cause of action, however great the damage to him or however malevolent the attitude of the party refusing to gratify his wish. *Allen v. Flood* (1898), A. C. 100, 152, 172; *London Co. v. Horn*, 206 Ill. 493, 504; *Heywood v. Tillson*, 75 Me. 225, 230; *Collins v. American Co.*, 68 N. Y. App. Div. 639; *McCune v. Norwich Co.*, 30 Conn. 521. But these and similar cases are foreign to the present discussion, which relates to possible torts. The refusals just mentioned cannot be torts, for they are not acts but failures to act. They would not be mentioned but for the fact that this fundamental distinction between a malevolent act and a malevolent non-feasance appears to have been overlooked by several of the judges in *Allen v. Flood*, [1901] A. C. 100, 152, 172.

² *Stevens v. Sampson*, 5 Ex. Div. 53, Odgers, Lib. & Sl., 3d ed., 292.

A French case furnishes another illustration. The plaintiff by planting certain crops had attracted a great amount of game to his country estate, and invited several of his friends from Paris for a day's hunt. The neighbor of the plaintiff, irritated by the latter's success, ordered his servants to make so much noise on his own land as to frighten away the game and so spoil the day's sport. He was made to pay damages to the plaintiff.¹ It is obvious, however, that if the neighbor, while hunting himself, had disturbed the hunt of the plaintiff by the noise of his dogs and guns, no action would have lain against him. The neighbor had just as much right to hunt as the plaintiff. LORD HOLT took the same distinction in a similar English case.² His language is much to the point: "Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong."³

Two decisions, one in France and one in Belgium, are especially instructive. In each case an employer threatened to discharge his employees if they traded with the plaintiff. In the one case the plaintiff kept a saloon which had exercised a demoralizing effect upon the defendant's workmen. The latter's prohibition against his men frequenting the plaintiff's saloon was held justifiable as a reasonable measure of discipline.⁴ In the other case the plaintiff was a political rival of the defendant, and the latter used his workmen as a means of ruining the plaintiff's business. In this case judgment was given for the plaintiff.⁵ It will be observed that in each of these cases the damage to the plaintiff was caused by the act of a single individual, and not by a combination of persons; that in each case the defendant used neither fraud nor force, but merely the pressure of a threatened loss of place, and that in each case the

¹ Prince de Wagram v. Marais, Cour de Paris, Dec. 2, 1871, Dalloz, 73, 2, 185.

² Keeble v. Hickeringill, 11 East, 574, n., Holt, 14, 3 Salk. 9, 11 Mod. 74, 130 S. C.

³ 11 Mod. 70.

⁴ Reding v. Kroll, Trib. de Luxembourg, Oct. 2, 1896, Sirey, 1898, 4, 16. "Les défendeurs auraient certainement abusé de leur droit, et, dès lors, commis un acte quasi-délictueux, s'il était établi, comme le demandeur l'affirme en termes de plaidoirie, que leur défense ne repose sur aucune nécessité de discipline ouvrière, qu'elle a été portée malicieusement et par pur esprit de vengeance."

⁵ Dapsens v. Lambret, Cour d'Appel de Liège, Feb. 9, 1888, Sirey, 1890, 4, 14. "Attendu qu'on ne saurait admettre qu'il soit permis, même par des actes licites absolument parlant, de ruiner un citoyen sans autre intérêt ou mobile que celui de la vengeance; qu'alors le summum jus devient la summa injuria."

workmen were under no obligation to trade with the plaintiff. The two cases illustrate in a very convincing manner how the motive with which an act is done may determine its lawfulness or unlawfulness. A similar distinction has been made in cases in this country brought against employers who induced their workmen not to trade with the plaintiff.¹

Similarly, whether employees, who, by threatening to strike, induce an employer not to engage the plaintiff or retain him in a service terminable at the employer's will, are guilty of a tort, may depend upon the motive of the defendants. If they objected to working with the plaintiff because his incompetency would expose them to danger, or because of his depraved character, no action would lie against them.² If on the other hand their motive was to wreak their vengeance upon him for his conduct towards them, they must pay the damages inflicted upon him by their conduct.³

¹ *Chipley v. Atkinson*, 23 Fla. 206, 216-217; *Graham v. St. Charles Co.*, 47 La. An. 214, 1657; *Internat. Co. v. Greenwood*, 2 Tex. Civ. Ap. 76. The decision in *Payne v. Western Co.*, 13 Lea (Tenn.), 508, is *contra*, but two of the five judges dissented, and the effect of the case as a precedent is nullified by statute. Shannon's Code (1896), § 6884. *Raycroft v. Tayntor*, 68 Vt. 219, is distinguishable. The defendant having quarreled with the plaintiff was warranted in objecting to his presence upon his land, although his objection required one of his own employees to choose between continuing in his service, and declining to employ the plaintiff as an assistant. The decision in *Heywood v. Tillson*, 75 Me. 225, is not open to question, for the defendant's conduct was a legitimate mode of protecting the interests of himself and his employees. But some of the *dicta* of the court are unsatisfactory and at variance with the decision in *Chesley v. King*, 74 Me. 164.

² *Giblan v. Nat. Union* (1903), 2 K. B. 600, 617, 619; *Heywood v. Tillson*, 75 Me. 225, 232; *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 130; *Nat. Prot. Ass'n v. Cumming*, 170 N. Y. 315.

³ *Giblan v. Nat. Union* (1903), 2 K. B. 606; *Joost v. Syndicat des Imprimeurs*, Cour de Cassation, June 22, 1892, Sirey, 93, 1, 41; *Joost v. Syndicat*, Cour d'Appel de Chambéry, March 14, 1893, Sirey, 93, 2, 139; *Oberle v. Syndicat des Ouvriers*, Cour d'Appel de Lyon, March 2, 1894, Dalloz, 94, 2, 305; *Monnier v. Renaud*, Cour de Cassation, June 9, 1896, Dalloz, 1896, 1, 582. In *Giblan v. Nat. Union*, *supra*, ROMER, L. J., said, pp. 619-620: "In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." In *Joost v. Syndicat*, *supra*, Sirey, 93, 2, 139, the court said: "Attendu que sans doute les ouvriers syndiqués avaient de leur côté le droit de se mettre en grève; mais qu'il n'est permis à personne d'abuser de son droit; qu'il y a abus d'un droit toutes les fois que

In the case supposed by several of the judges in *Allen v. Flood*,¹ the liability of the cook, who induced the master to dismiss the butler by threatening to leave himself if the butler were retained, should depend upon the motive of the cook. If the two were thrown together, and if the butler by his character or personality was distasteful to the cook, the latter, with a view to his own interest, would be justified in calling upon the master to choose between them. If, on the other hand, the cook, having no objection to the butler as a companion, procured his dismissal from pure malevolence, his conduct would be tortious.²

An Illinois decision³ illustrates the legal significance of the motive of a defendant who caused damage to the plaintiff by moral coercion upon the conduct of a third person. The defendant, an insurance company, had contracted by its policy to indemnify a manufacturer against liability for claims for injuries to his employees. The plaintiff was an employee who had been injured in the course of his employment. The defendant company recognized its liability, but disputed the amount demanded and threatened to have the employee discharged unless he accepted in full satisfaction the small amount offered. The employee refusing to yield, the company induced the employer to discharge the employee by threatening to exercise its right to cancel the policy. The plaintiff recovered substantial damages. The court said, however, that if the company had procured in this manner the dis-

celui qui prétend l'exercer n'agit que dans le but de nuire à autrui sans aucun intérêt pour lui même." In *Monnier v. Renaud*, *supra*, the case turned upon the point whether the defendant had been promoting "un intérêt professionnel" or had been influenced by "un sentiment de malveillance injustifiée."

As a rule, however, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer by the persuasive or coercive boycott, is not the damage to their victim, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question, not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy.

¹ (1898) A. C. 36, 57, 138-139, 165-166.

² The case seems to be covered by the following language of Mr. CHIEF JUSTICE HOLMES: "We cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether by false slanders or successful persuasion, is an actionable tort." *Moran v. Dunphy*, 177 Mass. 485, 487.

³ *London Co. v. Horn*, 206 Ill. 493.

missal of an employee, who by his bad habits or incompetency was likely to increase the risk of the company, such conduct would have been justifiable as a reasonable measure of self-protection.

In a Louisiana case, the plaintiff, an innkeeper who was also an assessor, had irritated the defendants by what they conceived to be an excessive valuation of their property. Purely to avenge this supposed grievance they persuaded certain commercial travelers to discontinue their patronage of the plaintiff's hotel. They were compelled to pay him substantial damages.¹

To divert to one's self the customers of a rival tradesman by the offer of goods at lower prices is, in general, a legitimate mode of serving one's own interest and justifiable as fair competition. If, however, a man should start an opposition shop, not for the sake of profit for himself, but, regardless of loss to himself, for the sole purpose of driving the plaintiff out of business and with the intention of retiring himself immediately upon the accomplishment of his malevolent purpose, would not this wanton causing of damage to another be altogether indefensible and a tort? Such a case is not likely to arise, but several judges have expressed the opinion that the defendant in such a case would have to make reparation.²

A close friend of a creditor advises him in good faith, that he is likely to lose his claim unless he proceeds without delay to collect it. The creditor acts on the advice, presses his claim, and the debtor is ruined, whereas, if he had received indulgence for a short time, an expected favorable turn in his affairs would have enabled him to weather the storm. Grievous as this loss is, he cannot hold the creditor's adviser responsible. But would there be any doubt as to his responsibility if he had given the same advice with full knowledge of the debtor's situation and for the sole purpose of ruining him?

The illustrations already given can hardly fail to convince the

¹ *Webb v. Drake*, 52 La. An. 290. *Delz v. Winfree*, 80 Tex. 400, is a similar case.

² *LORD COLERIDGE* in *Mogul Co. v. McGregor*, 21 Q. B. D. 544, 553; *LORD BOWEN*, s. c. 23 Q. B. Div. 598, 618; *LORD MORRIS*, s. c. (1892) A. C. 49; *LORD FIELD*, s. c. 52; *LORD HALSBURY* in *Allen v. Flood* (1898), A. C. 1, 77; opinion of court per *WELLS, J.*, in *Walker v. Cronin*, 107 Mass. 555, 564; *HOLMES, J.*, in *May v. Wood*, 172 Mass. 11, 15; opinion of court per *HAMMOND, J.*, in *Plant v. Wood*, 176 Mass. 492, 498; *TAFT, J.*, in *Moores v. Bricklayers Union*, 23 Oh. W. L. Bull. 48, 51, 52. But see *contra Passaic Works v. Ely*, 105 Fed. Rep. 163, *SANBORN, J.*, diss.; *Auburn Co. v. Douglass*, 9 N. Y. 444, 450, per *SELDEN, J.*; *Nat. Ass'n v. Cumming*, 170 N. Y. 315, 326.

reader that LORD MACNAGHTEN'S *dictum*, quoted at the opening of this paper, is untenable, and that there are many torts arising from the defendant's inducing a third person to act in such a way as to damage the plaintiff, although the defendant used neither fraud, force, nor defamation, and although the conduct of the third person was altogether lawful. The instances mentioned prove also how often the tortious quality of an act depends upon the motive of the actor. But other examples may be suggested.

To put poisoned food upon one's own land in order to kill a skunk gives no cause of action to one's neighbor, although the neighbor's dog eats the food and dies from the poison. But it has been decided in South Carolina that the neighbor may have an action if the defendant, knowing that the plaintiff's dog was in the habit of coming upon his premises, exposed the poisoned food for the express purpose that the dog might eat it and die.¹

To deposit rubbish in the highway would not ordinarily subject the depositor to an action at the suit of a private individual; but if the defendant placed it there in order to cause loss to the plaintiff, who was bound by contract with the town to keep the highway in good condition, we should all agree with the Connecticut court² that he would have to make good the loss to the plaintiff.

To kill a man whose life is insured, although a crime, is not, without more, a tort against the insurance company.³ But the crime would be also a tort to the company if committed for no other purpose than to inflict loss upon the latter.⁴

Other instances in which the success of the plaintiff depends upon the wrongful motive of the defendant doubtless will occur to the ingenious reader. He will find, however, that, in these new instances as well as in those suggested in this paper, it is for the plaintiff to allege and prove this wrongful motive. Generally the allegation must be made in the declaration. But in the case of malevolent publication of reports of judicial proceedings this allegation comes in the reply to the defendant's answer. Those who maintain that the law does not regard motive as an element

¹ Cobb v. Cater, 59 S. C. 462, 38 S. E. Rep. 114.

² McNary v. Chamberlain, 34 Conn. 384.

³ Ins. Co. v. Brame, 95 U. S. 754.

⁴ Conn. Co. v. N. Y. Co., 25 Conn. 265, 276; McNary v. Chamberlain, 34 Conn. 384, 388; Gregory v. Brooks, 35 Conn. 437, 446; 2 Mugdan, Die Gesamt-Materialien zum B. G. 407.

in a tort are wont to distinguish this case on the ground that the wrongful motive is simply a means of destroying the defense of privileged communication. But this reasoning seems specious rather than sound. For, when the facts of the particular case are developed, it is still true that the defendant is guilty of a tort, and the plaintiff wins solely because the defamation was induced by a wrongful motive.

As the plaintiff succeeds in certain cases of wilful damage by the defendant solely by proof of the actor's wrongful motive, so the defendant sometimes wins, notwithstanding he has wilfully damaged the plaintiff, solely by proof of a benevolent motive. One who has crossed the plaintiff's land in order to catch a train cannot urge his motive of self-interest as a justification. But if he crossed the land in order to rescue a child playing on the track from imminent peril of being run over by a train, his benevolent motive will be a full defense to an action of trespass.

Occasionally the authorities leave us in the dark as to whether a particular case is to be grouped with those in which the plaintiff must establish a malevolent motive or with those in which the defendant must prove a benevolent motive. Must a plaintiff, for example, in counting against a defendant for inducing a young woman to break her contract to marry the plaintiff allege also that the defendant acted from a malevolent motive, or at least from a selfish motive, or is the question of the motive properly to be raised only by the defendant's allegation that he acted from a benevolent interest in the welfare of his daughter? As a matter of principle it seems to the writer that the plaintiff states a *prima facie* case, and makes a good count by alleging simply that the defendant induced the third person to break her contract, *i. e.*, to do a legal wrong. If this is a correct view, the case has no bearing upon the subject of this paper. Otherwise it is another instance in which a wrongful motive may make an act a tort.

If this essay has accomplished its purpose, it is made clear that the *dictum* that our law never regards motive as an element in a civil wrong is as far from the truth as would be the statement that malevolently to damage another is always a tort. The truth lies in the middle. In certain cases, in spite of the wrongful motive of the actor, malevolently to damage another is lawful, either because the act is merely the exercise of an absolute legal right,

or because it is justified by paramount considerations of public policy. Except in such cases, however, wilfully to damage another by a positive act and from a spirit of malevolence is a tort, even though the same act, if induced by a rightful motive, would be lawful.¹

¹ The reader may have remarked that, except in a quotation, the words "malice," "malicious," and "maliciously" have not been used. Malice, as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive for the public good. If so "slippery" a word, to borrow LORD BOWEN'S adjective, were eliminated from legal arguments and opinions, only good would result.

FOLLOWING MISAPPROPRIATED PROPERTY INTO ITS PRODUCT.¹

IF a trustee wrongfully sells the trust-*res* or exchanges it for other property, the *cestui que trust* may charge him as a constructive trustee of the money or newly acquired property, or of any subsequent product of either;² or, if he prefers, he may enforce an equitable lien to the amount of the misappropriation upon any property in the hands of the wrongdoer, which is the traceable product of the original trust-*res*.³ If, at the time of relief given, the new property is worth less than the original trust-*res*, the *cestui que trust*, after exhausting his lien, will have a personal claim against the trustee for the difference. If the new property is worth as much as or more than the original trust-*res*, the enforcement of the constructive trust or of the equitable lien will be a full satisfaction of all claims founded on the breach of the express trust. When the value of the new property exceeds that of the original trust, the *cestui que trust*, by enforcing the constructive trust, makes a profit by the trustee's breach of the express trust, and this profit may be very large, as when the trust fund is invested in land or corporate shares which advance rapidly, or, to put the most conspicuous instance of great profit, when the trustee invests trust money in taking out a policy of life insurance which becomes payable soon afterwards by the death of the insured. The *cestui que*

¹ Reprinted by permission from the Harvard Law Review for May, 1906.

² If the wrongdoer after exchanging the original trust-*res* for other property buys it back again, the *cestui que trust* has the option of charging him as trustee of the old *res* or the newly acquired property. It was thought at one time that the Statute of Frauds barred the claim of the *cestui que trust* to land acquired by the misuse of the trust fund. *Newton v. Preston*, Pr. Ch. 103; *Kirk v. Webb*, Pr. Ch. 163; *Herron v. Herron*, Pr. Ch. 163, Free. Ch. 246 s. c.; *Kinder v. Miller*, Pr. Ch. 171, 2 Vern. 240 s. c.; *Halcot v. Marchant*, Pr. Ch. 168; *Hooper v. Gyles*, 2 Vern. 480; *Cox v. Bateman*, 2 Ves. 19. But these cases were long ago overruled, — *Lane v. Dighton*, Amb. 409; *Ames, Cas. on Trusts*, 1st ed., 323, 325, n. 1.

³ "The beneficial owner . . . is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money." *Per Jessel, M. R., Re Hallett*, 13 Ch. D. 696, 700.

trust takes the whole of the insurance money, although ten times as much as the trust money misappropriated.¹ This excess above full compensation is not given to the *cestui que trust* by reason of any merit on his part. It comes to him as a mere windfall. Public policy demands that the faithless trustee should not retain any advantage derived from his breach of trust. Hence the wholesome rule that whatever a trustee loses in the misuse of the trust fund he loses for himself, and whatever he wins, he wins for the beneficiary.²

If this rule is to be applied consistently, it follows that if a trustee buys property partly with his own money and partly with trust money, the *cestui que trust* is entitled to that proportion of the property bought which the trust money used bears to the entire purchase money. The authorities are numerous to this effect,³ although in several of them this result was assumed as a matter of course without argument. But in two States, Massachusetts and Ohio, the *cestui que trust* is allowed only a lien upon the new property to secure the amount of the misused trust fund.⁴

In several other cases the remedy given was that of a lien.⁵ But

¹ *Lehman v. Gunn*, 124 Ala. 213; *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Holmes v. Gilman*, 138 N. Y. 369; *Dayton v. Claffin Co.*, 19 N. Y. App. Div. 120; *Roberts v. Winton*, 100 Tenn. 484 (*semble*); *Bromley v. Cleveland Co.*, 103 Wis. 562, 567 (*semble*).

² A pledgee of shares who wrongfully sells them for \$5000 and afterwards buys them back for \$3000 and gives them to the pledgor upon payment of the debt must also surrender his profit of \$2000. *Langton v. Waite*, 6 Eq. 165, 173.

³ *Docker v. Somes*, 2 Myl. & K. 655; *Re Oatway* (1903), 2 Ch. 356; *Nat. Bank v. Ins. Co.*, 104 U. S. 54, 68; *Re Mulligan*, 116 Fed. Rep. 715, 717; *Barrett v. Kyle*, 17 Ala. 306; *Tilford v. Torrey*, 53 Ala. 120, 122; *Walker v. Elledge*, 65 Ala. 51 (*semble*); *Kelley v. Browning*, 113 Ala. 420; *Howison v. Baird*, 40 So. Rep. 94, 145 Ala. 683; *Byrne v. McGrath*, 130 Cal. 316; *Elizalde v. Elizalde*, 137 Cal. 634 (*semble*); *Bazemore v. Davis*, 55 Ga. 505; *Harris v. McIntyre*, 118 Ill. 275; *Reynolds v. Sumner*, 126 Ill. 58; *Fansler v. Jones*, 7 Ind. 277; *Bitzer v. Bobo*, 39 Minn. 18; *Morrison v. Kinston*, 55 Miss. 71; *White v. Drew*, 42 Mo. 51; *Bowen v. McKean*, 82 Mo. 594; *Shaw v. Shaw*, 86 Mo. 594; *Jones v. Elkins*, 143 Mo. 647; *Crawford v. Jones*, 163 Mo. 578; *McLeod v. Venable*, 163 Mo. 536; *Johnston v. Johnston*, 173 Mo. 91, 115; *Bohle v. Hasselbroch*, 64 N. J. Eq. 334; *Dayton v. Claffin Co.*, 19 N. Y. App. Div. 120; *Lyon v. Akin*, 78 N. C. 258; *Wallace v. Duffield*, 2 S. & R. (Pa.) 521; *Kepler v. Davis*, 80 Pa. 153; *Rupp's App.*, 100 Pa. 531; *Lloyd v. Woods*, 176 Pa. 63; *Sheetz v. Neagley*, 13 Phila. 506; *Green v. Haskell*, 5 R. I. 447; *Watson v. Thompson*, 12 R. I. 467; *Kaphan v. Torrey*, 58 S. W. Rep. 909 (Tenn. 1899); *Moffatt v. Shepard*, 2 Pinn. (Wis.) 66.

⁴ *Bresnihan v. Sheehan*, 125 Mass. 11; *Reynolds v. Morris*, 17 Oh. St. 510.

⁵ *Lane v. Dighton*, Amb. 409; *Price v. Blakemore*, 6 Beav. 507; *Hopper v. Conyers*, L. R. 2 Eq. 549; *Re Pumfrey*, 22 Ch. D. 255, 260; *Graves v. Pinchback*, 47 Ark. 470; *Humphreys v. Butler*, 51 Ark. 351; *Nat. Bank v. Barry*, 125 Mass. 20; *Munro v. Collins*, 95 Mo. 33; *Day v. Roth*, 18 N. Y. 448; *Bryant v. Allen*, 54 N. Y. App. Div. 500 (affirmed 166 N. Y. 637).

in these cases the question of an alternative right to a proportionate part of the new property was not raised by the counsel nor considered by the court. In truth, the *cestui que trust* should be given the option of a proportional part of the new property or a lien upon it, as may be most for his advantage.¹ If the new property appreciates, it will be for his interest to claim a proportionate share of it. If it depreciates, he will naturally prefer to claim a lien upon it to the extent of the misused trust money. In two States, New Jersey and Pennsylvania, a trustee, who makes a purchase partly with his own money and partly with a trust fund, is treated with extreme severity. In New Jersey he loses not only the share of profit attributable to the trust money, but also that due to his own money, the *cestui que trust* being entitled to the whole of the new property, subject to a lien in favor of the trustee to the amount of his own contribution.² In Pennsylvania, if the product of the joint funds is in the form of shares in different companies, some of which have appreciated, while others have depreciated, the *cestui que trust* may take his proportion of the purchase from the shares which have proved the most profitable.³

The principles thus far considered apply to all fiduciaries, not only to trustees, who have the legal title to the misappropriated property, but to bailees, guardians, and the like, who have possession, but not title.⁴ Although in a few early American cases the courts declined to permit the owner of property to recover its product, as a constructive trust, if the misappropriation was by any person other than a fiduciary,⁵ it is now well settled that one who has been deprived of his property by fraud, by theft, or by any wrongful conversion, may charge the fraudulent vendee, the thief, or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property.⁶

¹ This option was allowed in *Bitzer v. Bobo*, 39 Minn. 18; *Crawford v. Jones*, 163 Mo. 578; *Green v. Haskell*, 5 R. I. 447.

² *Bohle v. Hasselbroch*, 54 N. J. Eq. 334.

³ *Norris's App.*, 71 Pa. 106.

⁴ *Re Hallett*, 13 Ch. D. 696, 709, 710.

⁵ *Pascoag Bank v. Hunt*, 3 Edw. 583; *Campbell v. Drake*, 4 Eden, 94; *Rain v. McNary*, 4 Humph. (Tenn.) 356; *Cunningham v. Wood*, 4 Humph. (Tenn.) 417; *Hawthorne v. Brown*, 3 Sneed (Tenn.), 462.

⁶ *Fraud*. *Smith v. Atwood*, You. 607; *Taub v. McClelland Co.*, 10 Col. App. 190; *Farwell v. Homan*, 45 Neb. 424 (*semble*); *Bank of America v. Pollock*, 4 Edw. 215; *American Co. v. Fancher*, 145 N. Y. 552; *Converse v. Sickles*, 146 N. Y. 300.

At one time an action for money had and received was not allowed against a converter for the proceeds of the sale of the converted chattel.¹ But this doctrine was overruled two centuries ago.² There seems to be no good reason why one who has disseised another of his land and sold it, should not be similarly liable to the disseisee for the proceeds of the sale in an action for money had and received. But the right to such an action was denied in Massachusetts in 1843.³ Nor has the writer discovered any decision to the contrary. This Massachusetts decision, it is submitted, should not be followed. But be that as it may, it is believed that the courts of equity will not hesitate to give a disseisee the benefit of any property acquired by the disseisor in exchange for the land of the disseisee. Accordingly, the rule as to following misappropriated property into its product in the hands of the wrongdoer may be formulated as follows: If property of any kind is misappropriated in any manner by one who knows it to belong, either at law or in equity, to another, the true owner may charge the wrongdoer as a constructive trustee of any property in his hands which is the traceable product of the misappropriated *res*, or, if he prefers, he may enforce an equitable lien upon this traceable product to the extent of the value of the misappropriated *res*.⁴

If the misappropriated *res*, or its product, has been transferred by the wrongdoer, the rights of the defrauded owner to assert a trust or lien against the transferee will vary accordingly as the

(*semble*); *Reynolds v. Aetna Co.*, 28 N. Y. App. Div. 591; *Menz v. Beebe*, 102 Wis. 342.

Theft. *Cattley v. Loundes*, 34 W. R. 139; *Re Hulton*, 39 W. R. 303, 8 Morrell, 69 S. C.; *Pirtle v. Price*, 31 La. An. 357; *Nat. Bank v. Barry*, 125 Mass. 20; *Nebraska Bank v. Johnson*, 51 Neb. 346; *Lamb v. Rooney*, 100 N. W. Rep. 40, 72 Neb. 322; *Newton v. Porter*, 69 N. Y. 133 (affirming 5 Lans. 416); *Reynolds v. Aetna Co.*, 28 N. Y. App. Div. 591, 601.

Other wrongful conversions. *La Comité v. Standard Bank*, 1 C. & E. 87; *Re Woods*, 121 Fed. Rep. 599; *Graves v. Pinchback*, 47 Ark. 470 (*semble*); *Humphreys v. Butler*, 51 Ark. 351.

¹ *Philips v. Thompson*, 3 Lev. 191 (1675).

² *Lamine v. Dorell*, 2 Ld. Raym. 1216; *Hitchin v. Campbell*, 2 W. Bl. 827.

³ *Brigham v. Winchester*, 6 Met. (Mass.) 460.

⁴ It was decided in *Lister v. Stubbs*, 45 Ch. D. 1, that a fiduciary, who accepted a bribe from a third person, and invested the money in securities which appreciated, although liable to his beneficiary for the amount of the bribe, could not be compelled to surrender the securities. It is not easy to see the reason for this discrimination in favor of the bribe taker.

latter is a *mala fide* transferee, a *bona fide* donee, or a *bona fide* purchaser.

The *mala fide* transferee, obviously, is in the same case as the original wrongdoer.¹ If he gets the legal title from the wrongdoer he will hold it as the wrongdoer held it. If he gets merely the possession from a thief or other converter, he is himself a converter and becomes a trustee of any property which he may receive in exchange for the converted *res*.

The *bona fide* donee may or may not acquire the legal title to the *res* conveyed to him by the wrongdoer. If he gets the title, its acquisition, it is true, is honest; but its retention, after knowledge of his grantor's wrong in conveying it, would be dishonest, for he, a volunteer, would thereby enrich himself at the expense of the defrauded *cestui que trust*. From the moment of his discovery of his grantor's fraud, therefore, the *bona fide* donee is in the same position as to the *res* in his hands as if he had at that moment acquired the property *mala fide*.²

If, however, the *bona fide* donee should dispose of the property before discovering his grantor's fraud, he is not accountable for its value to the *cestui que trust*. Not at common law, for he has committed no legal tort in dealing with property which by the common law was his own. Nor in equity, for he has committed no equitable wrong in parting with legal title when he believed to be free from any equitable encumbrance. If his transfer was gratuitous, he is not accountable in any way to the defrauded *cestui que trust*.³ If, however, his transfer was for value received, the situation is changed. If he keeps the value received he, a volunteer, is making a positive gain at the expense of the *cestui que trust*. He must, therefore, either surrender the value received or account to the *cestui que trust* for the value of the misappropriated trust-*res*. But he should have the option of doing the one or the other. If the value received was less than the value of the *res* transferred by him, or if the newly acquired property has depreciated below the value of that

¹ *Wheeler v. Kirtland*, 23 N. J. Eq. 13.

² *Standish v. Babcock*, 52 N. J. Eq. 628; *Laws v. Williams*, 56 N. J. Eq. 553.

³ *Blake v. Metzgar*, 150 Pa. St. 291; *Bonesteel v. Bonesteel*, 30 Wis. 516. He may also buy the property from a subsequent *bona fide* purchaser and keep it. *Mast v. Henry*, 65 Iowa, 193.

A striking illustration of this principle is the emancipation by an innocent donee of a slave conveyed to him by a fraudulent donee.

res, the donee does all that can, in justice, be required of him by giving up what he received in exchange for his transfer.¹ He has acted honestly and makes no profit. If, on the other hand, the newly acquired property appreciates, and the donee prefers to give the *cestui* the value of the misappropriated *res*, the latter having received full compensation for what was taken from him cannot rightfully demand more. The donee, it is true, may, in this case, profit by the misconduct of the wrongdoer. But the retention of this profit by the *bona fide* donee is not forbidden by the principle of public policy which is properly invoked against the *mala fide* grantee of the wrongdoer. Even if the innocent donee cannot make reparation in value, because of his insolvency, he ought not to be obliged to give up to the defrauded *cestui que trust* the whole of the newly acquired property if that is worth more than the misappropriated trust-*res*. Full justice will be done if the *cestui que trust* is given a lien upon the newly acquired property to the extent of the value of the original trust-*res*. The surplus should go to the general creditors of the insolvent donee.

If the *bona fide* donee does not acquire the title to the misappropriated *res*, as when he receives it from a thief or other converter, he is himself, although morally innocent, guilty of a conversion, and must either surrender the converted chattel to the true owner or make reparation in value. Furthermore, if after discovering the title of the true owner, he should transfer the converted *res* in exchange for other property, he would be chargeable as a constructive trustee of the newly acquired property for the benefit of the true owner. Is he also chargeable as a constructive trustee, if his transfer was before his discovery of the tort of his transferor? There seems to be no decision upon this point. It is conceived, however, that equity should not create a constructive trust in this case, if the morally innocent donee is able and willing to make reparation in value for his technical tort. Even his insolvency should not give the defrauded owner more than a lien upon the newly acquired property, if its value exceeds that of the converted *res*, for compensation should be the limit of recovery for a tort, if the defendant acted in good faith.

If a *bona fide* donee of a thief or other converter may keep the

¹ *Robes v. Bent*, Moo. 552; *Wheeler v. Kirtland*, 23 N. J. Eq. 13 (*semble*); *Trucdell v. Bourke*, 29 N. Y. App. Div. 95 (affirmed) 161 N. Y. 634.

product of the converted *res*, in case he is ready to pay the value of the latter to the true owner, a *bona fide* purchaser from the wrongdoer must have the same privilege. And there is authority to this effect. In the well-considered case, *Dixon v. Caldwell*,¹ a military bounty warrant for 160 acres was stolen from the plaintiff, and, after the thief had forged the plaintiff's indorsement, sold to the defendant, a purchaser for value without notice of the theft or forgery. The defendant then surrendered the warrant to the government and obtained a patent vesting in him the title to 160 acres of land. The plaintiff sought to charge the defendant as a constructive trustee of this land, but his bill was dismissed, the court being of the opinion that the plaintiff's remedy by an action at law for the conversion of the certificate was adequate and that it would be inequitable to deprive the *bona fide* purchaser of his legal title to the land. If the *bona fide* purchaser is unable, because of insolvency, to make reparation in value for his conversion, he, like the *bona fide* donee under similar circumstances, should hold the newly acquired property subject to a lien in favor of the owner of the converted *res* to the extent of the value of the latter.

It follows from the Ohio decision, that, if the defendant, instead of exchanging the warrant for the patent to the land, had sold it, he would not have been liable to the plaintiff in an action of assumpsit for money had and received. There are, however, several decisions to the contrary.² But, it should be observed, nothing turned in these cases upon the form of action, since the amount recoverable was practically the same whether the action was assumpsit for money had and received, or trover for the value of the converted warrant. A case may be put, however, in which the defendant would be unfairly prejudiced, if the action of assumpsit for the proceeds of the sale were allowed. Suppose the defendant to have bought the warrant July 1, 1899, and to have sold it June 1, 1905. If actions of tort and contract are barred in six years, the plaintiff's action for conversion would be barred after July 1, 1905, but if he may also charge the defendant for the proceeds of the sale

¹ 15 Oh. St. 412, approved in *Mack v. Brammer*, 28 Oh. St. 508. See to the same effect, *Fletcher v. McArthur*, 117 Fed. Rep. 393.

² *Bobbett v. Pinkett*, 1 Ex. D. 368, 372; *Kleinwort v. Comptoir* (1894), 2 Q. B. 157; *Indiana Bank v. Holtsclaw*, 98 Ind. 85; *Buckley v. Second Bank*, 35 N. J. Eq. 400; *Johnson v. First Bank*, 6 Hun (N. Y.), 124. But see *contra*, *Baltimore Co. v. Burke*, 102 Va. 643.

on June 1, 1905, that action would not be barred until June 1, 1911.¹ It is submitted that the *bona fide* purchaser should not be subjected to the hardship of this prolonged liability.

It is hardly necessary to add that, if the *bona fide* purchaser acquired from the wrongdoer the title to the misappropriated property, he will hold it free and clear from all equitable claims of the defrauded *cestui que trust*, who must look to his faithless trustee alone for relief.

It has been assumed thus far that it was possible to find in the hands of the wrongdoer, the *mala fide* grantee, the *bona fide* donee or *bona fide* purchaser, some specific property which was unmistakably the product of the original misappropriated *res*. But, in truth, the bulk of the litigation upon this subject has grown out of the difficulty of finding the traceable product of the misappropriated property. If the misappropriation is a sale and the proceeds are invested in the purchase of a tract of land, or a jewel, or in a bond, or note, or are deposited in a bank to the credit of the depositor, the case is simple. The wrongdoer is clearly a constructive trustee of the land, jewel, bond, note or claim against the bank. Suppose, however, that the proceeds of the sale are 100 gold eagles, and that these coins, which are obviously held in trust for the victim of the misappropriation, are put into a bag by the wrongdoer with 100 gold eagles of his own. It is impossible to identify the trust coins. Has the trust, therefore, disappeared? No. Since one gold eagle is just like another, the defrauded *cestui que trust* may say one half of the 200 gold eagles in the bag is held in trust for him, while the other half belongs to the wrongdoer. Suppose, now, that the wrongdoer spends 50 of the gold eagles for his own benefit. Is the *cestui's* claim reduced to 75 or is he still entitled to 100 of the 150 gold eagles remaining? It is well settled that he has the right to 100. This result is commonly explained by saying that the wrongdoer must be presumed to have intended to use his own share of the mixed fund, rather than the share of the *cestui que trust*.² This is, of course, a pure fiction. A thief is not likely to manifest such consideration for the victim of his theft. Furthermore, even if it could be proved that

¹ Ivey v. Owens, 28 Ala. 641; Lamb v. Clark, 5 Pick. (Mass.) 193; Robertson v. Dunn, 87 N. C. 191.

² Re Hallett, 13 Ch. D. 696, 712, 720.

the thief actually intended to spend the *cestui que trust's* share first, the result would be the same. The *cestui que trust* would still be entitled to his 100 gold eagles. The true explanation, it is submitted, is this. The *cestui que trust* has an option, the moment the coins are mixed in the bag, to claim either a moiety of the coins, or a charge upon the whole to the amount of the coins originally held in trust for him, that is, 100. On this theory so long as 100 gold eagles remain in the bag, the *cestui que trust* is safe. But if the wrongdoer should spend 150 of the coins, the charge would be only upon the 50 remaining even though the wrongdoer should afterwards put 50 coins in the bag.

The same reasoning applies to the case in which the wrongdoer deposits trust funds together with money of his own in a bank. If, for example, he deposits \$1000 of trust funds and \$1000 of his own, the *cestui que trust* may at his election hold the wrongdoer as a trustee of a moiety of the \$2000 claim against the bank, or he may enforce a charge upon the claim to the amount of \$1000, and this charge or lien will fully protect the *cestui que trust* so long as the amount to the credit of the wrongdoer does not drop below \$1000, no matter how many checks are drawn upon the bank and regardless of fresh deposits. But if the deposit account falls, at any time, below \$1000, or is all drawn out, the security of the *cestui que trust* diminishes *pro tanto* in the one case and vanishes in the other case.¹ Nor will the security be increased or reappear, by reason of subsequent deposits of his own money by the wrongdoer.²

Let us suppose again that the wrongdoer after depositing \$1000 of the trust money with \$1000 of his own, draws out \$1000 with

¹ These statements are supported by the decisions. *Re Hallett*, 13 Ch. D. 696 (overruling *Pennell v. Deffell*, 4 De G. M. & G. 372, and *Brown v. Adams*, 4 Ch. 764); *Gibbert v. Gonard*, 54 L. J. Ch. 439; *Spokane Co. v. First Bank*, 68 Fed. Rep. 979, 981 (*semble*); *Re Swift*, 108 Fed. Rep. 212, 113 Fed. Rep. 203; *Re Mulligan*, 116 Fed. Rep. 715, 717, 721; *Re Graff*, 117 Fed. Rep. 343; *Elizalde v. Elizalde*, 137 Cal. 634; *Windstanley v. Second Bank*, 13 Ind. App. 544, 547; *Morse v. Satterlee*, 81 Ia. 491; *Englar v. Offutt*, 70 Md. 78, 86; *Drovers Bank v. Roller*, 85 Md. 495, 499 (*semble*); *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 336; *Importers Bank v. Peters*, 123 N. Y. 272; *Blair v. Hill*, 50 N. Y. App. Div. 33; *Greene's Est.*, 20 N. Y. Supp. 94; *Northern Co. v. Clark*, 3 N. Dak. 26, 30; *State v. Foster*, 5 Wyo. 199, 215.

² *Re Hallett*, 13 Ch. D. 696, 731 (*semble*); *Mercantile Co. v. St. Louis Co.*, 99 Fed. Rep. 485; *Re Mulligan*, 116 Fed. Rep. 715, 719 (*semble*); *Cole v. Cole*, 54 N. Y. App. Div. 37; *Re Youngs*, 5 Dem. Sur. 141.

which he buys shares in a company or other property which remains in his hands. The *cestui que trust* may charge the wrongdoer as a trustee of a moiety of the remaining claim against the bank for \$1000 and also of a moiety of the shares or other property bought with the \$1000 drawn out.¹ It seems clear that he should also have a right to enforce a lien for the \$1000 upon both the remaining deposit and the shares or other newly bought property, if he finds it for his interest to do so.² In New Jersey, however, the court, invoking the fiction that the wrongdoer, in drawing on the mixed deposit account, must be presumed to draw out his own money first, would give to the *cestui que trust* in the case supposed no claim upon the shares or other newly bought property.³

There is another class of cases illustrating the confusion of funds. A bank receives money on general deposit, knowing that it has no right to receive it, either because of its known insolvency or because the depositor is an official who is prohibited by law from so depositing the money he holds as an official. The bank fails soon afterwards, having in the meantime received and paid out divers sums of money. The money wrongfully received was mixed, of course, with the other money of the bank. Must the depositor, or the body which he represents, come in with the general creditors, or is he entitled to a preference? The answer depends upon the amount of money continuously in the bank from the time of the bank's wrongful receipt of the deposit. The moment the \$1000 was mixed with the other money of the bank, the depositor became *cestui que trust* of that proportion of all the money then in the bank, which \$1000 bore to the total money, or he might claim a lien to the amount of \$1000 upon all the money in the bank. If the total amount of money in the bank was continuously from the moment of the deposit, up to the time the bank closed its doors, equal to or more than \$1000, the depositor would be paid in full. If at any time the total amount dropped below \$1000, the depositor's security would be reduced *pro tanto*, and would not be increased by any subsequent receipt of money of its own.⁴ The

¹ *Re Oatway* (1903), 2 Ch. 856; *Lincoln v. Morrison*, 64 Neb. 822. But see *contra*, *Bevan v. Citizens Bank*, 19 Ky. Law Rep. 1260; *Bright v. King*, 20 Ky. Law Rep. 186.

² *Lamb v. Rooney*, 100 N. W. Rep. 410, 72 Neb. 322.

³ *Standish v. Babcock*, 52 N. J. Eq. 628.

⁴ *Wasson v. Hawkins*, 59 Fed. Rep. 233; *Massey v. Fisher*, 62 Fed. Rep. 958; *Boone Bank v. Latimer*, 67 Fed. Rep. 27; *Cleveland Bank v. Hawkins*, 79 Fed. Rep.

mixing of the depositor's money and the bank's money in the vaults of the bank is not to be distinguished from the mixing by the wrongdoer who puts his own gold eagles with those of another in a bag, or, as in *Kirby v. Wilson*,¹ in his pockets.

Let us now suppose that the misappropriated *res* cannot be traced into any specific land, chattels, bank deposit, or into the money in a bank, but that the court is convinced that the fund for distribution among the creditors of the wrongdoer is larger than it would have been but for the misappropriation. Should the victim of the misappropriation come in ahead of the general creditors? Obviously he cannot establish any trust or lien for want of any specific *res*. But in justice he should be treated as a preferred creditor as to the excess of the actual fund for distribution above what it would have been if the misappropriation had not been made. The general creditors should not make a profit by their debtor's misuse of another's property and at the expense of the defrauded owner. There seems to be no decision on this point. But this is not surprising, for in practice it will be extremely difficult to prove the excess in the fund for distribution without tracing the misappropriated *res* into some specific product.

In a few jurisdictions the true owner is given a preference over the general creditors of the wrongdoers upon the mere proof that the latter had the benefit of the misappropriated *res*, even though it is impossible to prove that the fund for distribution among the

29; *Indep. Dist. v. Beard*, 83 Fed. Rep. 5 (reversed in 88 Fed. Rep. 375, but because of a different view of the facts); *Merch. Bank v. School Dist.*, 94 Fed. Rep. 705; *Quinn v. Earle*, 95 Fed. Rep. 728, 731; *Richardson v. N. O. Co.*, 102 Fed. Rep. 780, 785; *Richardson v. Oliver*, 105 Fed. Rep. 277; *Re Swift*, 108 Fed. Rep. 212, 215; *Woodhouse v. Crandall*, 197 Ill. 104 (reversing 99 Ill. App. 552); *Windstanley v. Second Bank*, 13 Ind. App. 544, 554; *Sherwood v. Central Bank*, 103 Mich. 109; *Wallace v. Stover*, 107 Mich. 190; *Board v. Wilkinson*, 119 Mich. 655; *Bishop v. Mahoney*, 70 Minn. 238, 240; *Shields v. Thomas*, 71 Miss. 260, 270; *State v. Bank of Commerce*, 54 Neb. 725; *State v. Bank of Commerce*, 61 Neb. 181; *Lincoln v. Morrison*, 64 Neb. 822; *Arnot v. Bingham*, 55 Hun (N. Y.), 553; *People v. Merch. Bank*, 92 Hun (N. Y.), 159; *Re Holmes*, 37 N. Y. App. Div. 15 (affirmed 159 N. Y. 532); *Kimmel v. Dickson*, 5 S. Dak. 221; *Piano Co. v. Auld*, 14 S. Dak. 512; *Bank v. Weems*, 69 Tex. 489; *Burnham v. Booth*, 89 Wis. 362, 368; *Slater v. Foster*, 5 Wyo. 199.

Phila. Bank v. Dowd, 38 Fed. Rep. 172, contains a *dictum* against the right of the *cestui que trust*, but this opinion was expressly rejected in *Massey v. Fisher*, 62 Fed. Rep. 958, and is not likely to be followed. In *People v. City Bank*, 96 N. Y. 32, on the other hand, the court seems to have given the *cestui que trust* more than his just claim.

¹ 98 Ill. 240.

general creditors is, at the time of the preference allowed, larger than it would have been but for the misappropriation.¹ But the allowance of a preference under such conditions is unjust to the general creditors. If the product of the true owner's *res* is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. If the true owner's *res* was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim,² in which case, also, the dividends of the other creditors would not be affected by the misappropriation. The same result is reached if, without subrogation, the true owner is allowed to prove ratably, with the other creditors. But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors. If the true owner's *res* has been squandered, the dividend of the other creditors must be less because of the right of the true owner to prove his claim. But here, too, it would be gross injustice to pay the true owner in full, and thereby diminish still further the dividend of the general creditors. The authorities are nearly unanimous against this unjust preference.³

¹ *First Bank v. Hummel*, 14 Col. 259; *Hopkins v. Burr*, 24 Col. 502; *Banks v. Rice*, 8 Col. App. 217 (but see *McClure v. La Plata Co.*, 19 Col. 122; *Holden v. Piper*, 5 Col. App. 71); *Davenport v. Plow Co.*, 80 Ia. 722 (but see *Indep. Dist. v. King*, 80 Ia. 497; *Jones v. Chesebrough*, 105 Ia. 303; *Ewell v. Clay*, 107 Ia. 56; *Moore v. Chesebrough* (1900, Ia.), 81 N. W. Rep. 469; *Bradley v. Chesebrough*, 111 Ia. 126; *Sioux Co. v. Fribourg*, 121 Ia. 230); *Peak v. Ellicott*, 30 Kan. 637; *Reeves v. Pierce*, 64 Kan. 502 (but see *Burrows v. Johntz*, 57 Kan. 778; *Travellers Co. v. Caldwell*, 59 Kan. 156; *Kansas Bank v. First Bank*, 62 Kan. 786; *Carley v. Graves*, 85 Mich. 483 (but see *Board v. Wilkinson*, 119 Mich. 655); *Harrison v. Smith*, 83 Mo. 210 (overruling *Miles v. Post*, 76 Mo. 426); *Stoller v. Coates*, 88 Mo. 514; *Evangel. Synod v. Schoeneich*, 143 Mo. 652; *Pundman v. Schoeneich*, 144 Mo. 194 (but see *Bircher v. Walther*, 163 Mo. 461); *Griffin v. Chase*, 36 Neb. 328; *Capital Bank v. Coldwater Bank*, 49 Neb. 786; *State v. Midland Bank*, 52 Neb. 1 (but see *State v. Bank of Commerce*, 54 Neb. 725).

² *Cotton v. Dacey*, 61 Fed. Rep. 481; *Jefferson v. Edrington*, 53 Ark. 345; *Standish v. Babcock*, 52 N. J. Eq. 628, in which cases the subrogation was to the right of a creditor secured by a mortgage.

³ *Multnomah Co. v. Oreg. Bank*, 61 Fed. Rep. 912 (disapproving *San Diego Co. v. Cal. Bank*, 52 Fed. Rep. 59); *Spokane Co. v. First Bank*, 68 Fed. Rep. 979; *City Bank v. Blackmore*, 75 Fed. Rep. 771; *Metrop. Bank v. Campbell Co.*, 77 Fed. Rep. 705; *St. Louis Asso. v. Austin*, 100 Ala. 313; *Bank v. U. S. Co.*, 104 Ala. 297; *Winston v. Miller*, 139 Ala. 259; *Ober Co. v. Cochran*, 118 Ga. 306; *Lanterman v. Travers*, 174 Ill. 459;

Seiter v. Mowe, 182 Ill. 351, 81 Ill. App. 397; *Windstanley v. Second Bank*, 13 Ind. App. 544; *Robinson v. Woodward*, 28 Ky. Law Rep. 1142; *Englar v. Offutt*, 70 Md. 78; *Drovers Bank v. Roller*, 85 Md. 495; *Little v. Chadwick*, 151 Mass. 109; *Bishop v. Mahoney*, 70 Minn. 238; *Twohy v. Melbye*, 78 Minn. 257; *Shields v. Thomas*, 71 Miss. 260; *Lincoln v. Morrison*, 64 Neb. 822 (overruling earlier Nebraska cases); *Perth Co. v. Middlesex Bank*, 60 N. J. Eq. 84; *Ellicott v. Kuhl*, 60 N. J. Eq. 333; *O'Callaghan's App.*, 64 N. J. Eq. 287; *Re Cavin*, 105 N. Y. 256; *Re North Bank*, 60 Hun (N. Y.), 91; *Atkinson v. Rochester Co.*, 114 N. Y. 168; *People v. American Co.*, 2 N. Y. App. Div. 193; *Cole v. Cole*, 54 N. Y. App. Div. 37; *Re Hicks*, 170 N. Y. 195; *Northern Co. v. Clark*, 3 N. Dak. 26; *Ferchen v. Arndt*, 26 Ore. 121; *Muhlenberg v. N. W. Co.*, 26 Ore. 132; *Re Assignment*, 32 Ore. 84; *Freiberg v. Stoddard*, 161 Pa. 259; *Lebanon Bank*, 166 Pa. 622; *Slater v. Oriental Mills*, 18 R. I. 352; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; *Nonotuck Co. v. Flanders*, 87 Wis. 237 (overruling the earlier Wisconsin cases); *Burnham v. Barth*, 89 Wis. 362; *Thucmmier v. Barth*, 89 Wis. 381; *Henika v. Heinemann*, 90 Wis. 478; *Gianella v. Morssen*, 90 Wis. 476; *Stevens v. Williams*, 91 Wis. 58; *Dowie v. Humphrey*, 91 Wis. 98; *Hyland v. Roe*, 111 Wis. 361; *State v. Foster*, 5 Wyo. 199, 215.

CONSTRUCTIVE TRUSTS BASED UPON THE BREACH OF AN EXPRESS ORAL TRUST OF LAND.¹

AN express trust may arise in any one of three ways:

1. The owner of property may undertake to hold it in trust for another.

2. The owner of property may transfer it to another, either in his lifetime or by will, to hold upon trust for a third person, or for the grantor himself if the conveyance is *inter vivos*.

3. A purchaser may procure the conveyance by the seller of the property purchased to a third person, to hold upon trust either for the purchaser or for some other person.

If the trust is of land and oral, and the trustee, after undertaking the trust in good faith, declines to perform it, what are the legal relations of the trustee, the *cestui que trust*, and the creator of the trust?

In the face of the statute of frauds, which provides that in the absence of a writing the trust shall be "only void and of none effect," equity, it is clear, cannot compel the performance of the express trust. But does it follow from this that the trustee, who has broken his promise, is subject to no legal obligation whatever? In answering this question it will be helpful to consider separately each of the three classes of express trusts already described.

1. Declarations of trust by the owner.

The owner of land, who orally declares himself a trustee of it, may make this declaration gratuitously, or for value received. If the declaration of trust is gratuitous, and the trustee repudiates the trust, sheltering himself under the statute of frauds, that is the end of the matter. The express trust being invalid, the *cestui que trust* fails to make the expected gain, and the trustee does not suffer the anticipated loss. The old *status quo* being unchanged, there is no basis for any other claim against the trustee.

If, on the other hand, the declaration of trust is for money received or other consideration, the situation is different. In this case,

¹ Reprinted by permission from the Harvard Law Review for May, 1907.

as in the other, by force of the statute the *cestui que trust* cannot get, and the trustee may keep, the land. But shall he be allowed to keep also the money or other consideration given to him by the *cestui que trust*? It is one thing for a promisor to save himself from a loss by reliance upon the statute, and quite another to make the statute a source of profit to himself at the expense of the promisee. Justice demands the restoration, so far as possible, of the *status quo* by compelling the trustee to surrender to the *cestui que trust* whatever he received from the latter upon the faith of his promise to perform the trust. Such relief does not in any way infringe upon the statute. The invalidity of the express trust is fully recognized. Indeed, it is the exercise of the trustee's right to use it as a defense that creates the *cestui que trust's* right of *restitutio in integrum*. This conclusion is abundantly supported by the decisions. One who has received money for an oral agreement to convey land, and refuses to convey, must refund the money.¹ If the consideration given for such an agreement was work and labor, that of course cannot be given back in specie, but the promisor must pay the value of such work and labor.² If the consideration was in the form of chattels, the promisor who breaks his promise, and also refuses to return the chattels, may be sued in trover or replevin,³ if he still has them, and in quasi-contract for their value or their proceeds, if he has consumed them or sold them.⁴ Similarly, if the oral agreement was for the exchange of lands, and one party having conveyed his, the other refuses to make the counter conveyance, the grantor may compel a reconveyance of his own land if the

¹ Allen v. Booker, 2 Stew. (Ala.) 21; Barickman v. Kuykendall, 6 Blackf. (Ind.) 21; Hunt v. Sanders, 1 A. K. Marsh. (Ky.) 556; Jellison v. Jordan, 68 Me. 373; Cook v. Doggett, 2 Allen (Mass.) 439; Bacon v. Parker, 137 Mass. 309, 311; Payne v. Hackness, 84 Minn. 195; Perkins v. Niggerman, 6 Mo. App. 546; Gilbert v. Maynard, 15 Johns. (N. Y.) 85; Cade v. Davis, 96 N. C. 139; Rineer v. Collins, 156 Pa. St. 342; Bedell v. Tracy, 65 Vt. 494; Thomas v. Sowards, 25 Wis. 631.

² Grant v. Grant, 63 Conn. 530; Schoonover v. Vachon, 121 Ind. 3; Holbrook v. Clapp, 165 Mass. 563; Ham v. Goodrich, 37 N. H. 185; King v. Brown, 2 Hill (N. Y.), 485; Gifford v. Willard, 55 Vt. 36; Kessler's Estate, 87 Wis. 660.

³ Keath v. Patton, 2 Stew. (Ala.) 38; Updike v. Armstrong, 4 Ill. 564; Shreve v. Grimes, 4 Litt. (Ky.) 220, 223; Keith v. Patton, 1 A. K. Marsh. (Ky.) 23; Duncan v. Baird, 8 Dana (Ky.), 101; Luey v. Bundy, 9 N. H. 298; Rutan v. Hinchman, 30 N. J. L. 255; Orand v. Mason, 1 Swan (Tenn.), 196; Miller v. Jones, 3 Head (Tenn.), 525.

⁴ Sailors v. Gambriel, Smith (Ind.), 82. In some jurisdictions the remedy of quasi-contract is allowed, although the sale or destruction of the chattel is not established. Booker v. Wolf, 195 Ill. 365.

grantee still has it,¹ and may recover the proceeds of the sale or its value if it has been sold.²

2. Conveyances upon trust for the grantor or a third person, and devises upon trust for a third person.

If A. conveys land to B. upon an oral trust to hold for or re-convey to himself, the grantor, and B. repudiates the trust which he assumed in good faith, the case is clearly within the principles which we have found to govern the first class of cases already considered. A. cannot enforce performance of the express trust because of the statute of frauds. But B. ought not to be allowed to retain A.'s land and thus by his breach of faith to enrich himself at the expense of A. If he will not perform the express trust, he should be made to reconvey the land to A., and to hold it until reconveyance as a constructive trustee for A. A., it is true, may by means of this constructive trust get the same relief that he would secure by the enforcement of the express trust. But this is a purely accidental coincidence. His bill is not for specific performance of the express trust, but for the restitution of the *status quo*. This right to *restitutio in integrum* has been enforced in several English cases.³ There are a decision in Canada⁴ and a dictum in Missouri⁵ to the same effect. In Massachusetts the grantor is allowed to recover not the land but the value of the land in a count for land conveyed.⁶ But in several states the grantor

¹ Burt v. Bowles, 69 Ind. 1; Jarboe v. Severin, 85 Ind. 496; Ramey v. Stone, 23 Ky. L. Rep. 301; Dickerson v. Mays, 60 Miss. 388.

² Wiley v. Bradley, 5 Ind. App. 272; Smith v. Hatch, 46 N. H. 146; Smith v. Smith, Winst. Eq. (N. C.), 30. In Bassford v. Pearson, 9 Allen (Mass.), 387, there is a dictum that assumpsit for money had and received cannot be maintained by the grantor for the proceeds of his land sold by the grantee. No reason is given for this dictum and it seems indefensible. In several cases the grantor was allowed to recover the value of his land from the grantee who still had it, but the question of the plaintiff's right to recover the land itself seems not to have been in the mind of either party. Bassett v. Bassett, 55 Me. 127; Miller v. Roberts, 169 Mass. 134; Nugent v. Teachout, 67 Mich. 571; Dikeman v. Arnold, 78 Mich. 455; Andrews v. Broughton, 78 Mo. App. 179; Henning v. Miller, 83 Hun (N. Y.), 403.

³ Davies v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. 469; Booth v. Turle, L. R. 16 Eq. 182; Marlborough v. Whitehead (1894), 2 Ch. 133; De la Rochefoucauld v. Bonstead (1897), 1 Ch. 196.

⁴ Clark v. Eby, 13 Grant Ch. (U. C.).

⁵ Peacock v. Peacock, 50 Mo. 256, 261.

⁶ Twomey v. Crowley, 137 Mass. 184; O'Grady v. O'Grady, 162 Mass. 290; Cromwell v. Norton, 79 N. E. Rep. 433, 193 Mass. 291.

is not allowed to recover either the land or its value.¹ In many others, also, the courts, while properly refusing to enforce the express trust, give no intimation of any right to recover the land on any theory of restitution, or its value on the principle of quasi-contract.²

The Massachusetts rule permitting the grantor to recover the value of the land instead of the land itself is illogical. It is based upon the principle of restitution. But this principle requires restitution *in specie* whenever it is practicable, and restitution in value only as a substitute when specific restitution is impossible. The Massachusetts rule, too, is inferior to the English rule in point of justice. If the grantee, when he repudiates his oral obligation, is insolvent, the grantor in Massachusetts must come in with the general creditors and get only a dividend on the value of the land, whereas in England he would recover the land itself. The statute of limitations would bar the money claim much sooner than the claim for the land. If, again, after the repudiation of the express oral trust, the land should appreciate greatly in value, the repudiator would, in Massachusetts, reap the benefit of this appreciation, while in justice it should go to the grantor.³

But restitution in value is certainly an approximation to full justice, and in many cases the grantee would be as well satisfied with the value of the land as with the land itself. But there is nothing to be said in defense of the prevailing American doctrine which gives the grantor neither the land nor its value. This doctrine is due to the failure of the court to perceive that specific

¹ Mescall v. Tully, 91 Ind. 96; Calder v. Moran, 49 Mich. 14 (*semble*); Wolford v. Farnham, 44 Minn. 159; Marcel v. Marcel, 70 Neb. 498; Sturtevant v. Sturtevant, 20 N. Y. 39.

² Patton v. Beecher, 62 Ala. 579; Brock v. Brock, 90 Ala. 86; Jacoby v. Funkhouser, 40 So. Rep. 291, 147 Ala. 254; McDonald v. Hooker, 57 Ark. 632; Barr v. O'Donnell, 76 Cal. 469; Sheehan v. Sullivan, 126 Cal. 189; Verzier v. Conrad, 75 Conn. 1; Stevenson v. Crapnell, 114 Ill. 19; Moore v. Horsley, 156 Ill. 36; Fouty v. Fouty, 34 Ind. 433; Gowdy v. Gordon, 122 Ind. 533; Ostenson v. Severson, 126 Ia. 197; Gee v. Thrailkill, 45 Kan. 173; Wentworth v. Skibles, 89 Me. 167; Moore v. Jordan, 65 Miss. 229; Conner v. Follansbee, 59 N. H. 124; Hogan v. Jaques, 19 N. J. Eq. 123; Lovett v. Taylor, 54 N. J. Eq. 311 (criticizing the English cases); Boreham v. Craig, 80 N. C. 224; Barry v. Hill, 166 Pa. St. 344; Taft v. Dimond, 16 R. I. 584; Kinsey v. Bennett, 37 S. C. 319; Parry v. American Co., 56 Wis. 221.

³ It is assumed that the value of the land at the time of the repudiation of the express trust would be the amount payable by the grantee. But there seems to be no decision on this point.

performance of an express agreement and compulsory restitution of the consideration for the agreement are fundamentally different things, even in cases in which the practical result of the two remedies is the same.¹ This oversight of the American courts is the more surprising, because in another class of cases, not to be distinguished in principle from those under consideration, the same courts, unwilling to permit the grantee to profit by his breach of faith at the expense of the grantor, have rightly given to the grantor, by way of restitution, the same practical relief which specific performance would have given him if that could have been enforced. This other class of cases is commonly said to illustrate the rule that oral evidence is admissible to show that an absolute conveyance was intended to operate as a mortgage. This, of course, is a loose way of stating the principle. In truth, equity cannot compel specific performance of the oral agreement to reconvey, because the statute of frauds forbids. But, if the grantor pays or tenders the amount due to the grantee, it would be shockingly unjust for the grantee to keep the land. Equity therefore says to the grantee, "We cannot compel you to perform your promise to reconvey, but if you will not keep your word, surrender to the grantor what you received from him on the faith of your promise." Obviously this reasoning, which justifies the result in the mortgage cases, is equally cogent in the cases in which A. conveys to B. upon an oral trust to reconvey, and in England both classes of cases are dealt with as resting upon the same principle of *restitutio in integrum*.

If A. conveys land to B. upon an oral trust for C., and B. refuses to perform the trust, the rights of the parties are easily defined. C. obviously cannot enforce the express trust,² nor, since he has

¹ Some of the American decisions were influenced by a hasty and now overruled judgment of LEACH, V. C., in *Leman v. Whitley*, 4 Russ. 423. In that case the really gratuitous conveyance upon the oral trust for the grantor purported to be in consideration of £400. The vice-chancellor, having committed the error of refusing relief by way of restitution, was so much impressed by the resulting injustice that he gave the grantor a vendor's lien for the ostensible purchase money, and thereby fell into another error. This error was repeated in *Gallagher v. Mars*, 50 Cal. 23; *McCoy v. McCoy*, 32 Ind. App. 38. But this extension of the vendor's lien to cover a case in which no money was payable has been generally repudiated. *Stevenson v. Crapnell*, 114 Ill. 19; *Ostenson v. Severson*, 126 Ia. 197; *Palmer v. Stanley*, 41 Mich. 218; *Tatge v. Tatge*, 34 Minn. 272.

² *Skett v. Whitmore*, Freem. Ch. (Miss.) 280; *Jacoby v. Funkhouser*, 40 So. Rep. 291, 147 Ala. 254; *Ammonette v. Black*, 73 Ark. 310; *Smith v. Mason*, 122 Cal. 426;

parted with nothing, can he have relief upon any other ground. But A., as in the preceding case, may recover his land,¹ for B. may not honestly keep it if he will not fulfill the promise which induced A. to part with it. In Massachusetts A. would probably recover the value of the land instead of the land itself.²

One would expect a devise by A. to B. upon an oral trust for C. to create the same rights upon B's refusal to perform the trust as a conveyance by A. to B. upon an oral trust for C., except that, restitution to the testator being impossible, his heir, as representing him, would be entitled to the reconveyance of the land. But by a strange inconsistency in the law both in England and in this country, C. is allowed to get the benefit of the trust in spite of the statute of frauds.³ These decisions were induced by the desire to prevent the use of the statute as an instrument of fraud. But the courts seem to have lost sight of the distinction between a misfeasance and a non-feasance, between a tort and a passive breach of contract. If a devisee fraudulently induces the devise to himself, intending to keep the property in disregard of his promise to the testator to convey it or hold it for the benefit of a third person, and then refuses to recognize the claims of the third person, he is guilty of a tort, and equity may and does compel the devisee to make specific

Robson v. Hamell, 6 Ga. 589; Lantry v. Lantry, 51 Ill. 458; Marie Church v. Trinity Church, 205 Ill. 601; Meredith v. Meredith, 150 Ind. 299; Willis v. Robertson, 121 Ia. 380; Rogers v. Richards, 67 Kan. 706; Philbrook v. Delano, 29 Me. 410; Campbell v. Brown, 129 Mass. 23; Perkins v. Perkins, 181 Ill. 401; Shafter v. Huntington, 53 Mich. 310; Luse v. Reed, 63 Minn. 5; Metcalf v. Brandon, 58 Miss. 841; Taylor v. Sayles, 57 N. H. 465; McVay v. McVay, 43 N. J. Eq. 47; Goldsmith v. Goldsmith, 143 N. Y. 313, 318 (but see Ahrens v. Jones, 169 N. Y. 555); Salter v. Bird, 103 Pa. St. 436; Perkins v. Cheairs, 58 Tenn. 194.

¹ Hal v. Linn, 8 Colo. 264; Von Trotha v. Bamberger, 15 Colo. 1 (*semble*); McKinney v. Burns, 31 Ga. 295; Peacock v. Peacock, 50 Mo. 256, 261.

But see, *contra*, Irwin v. Ivers, 7 Ind. 308; Calder v. Moran, 49 Mich. 14 (*semble*).

² Basford v. Pearson, 9 Allen (Mass.), 387 (discrediting Griswold v. Messenger, 6 Pick. (Mass.) 517); Twomey v. Crowley, 137 Mass. 184.

³ Sellach v. Harris, 2 Eq. Cas. Abr. 46, pl. 11; Norris v. Fraser, 15 Eq. Rep. 318; De Laureheel v. De Boom, 48 Cal. 581; Buckingham v. Clark, 61 Conn. 204; Larmon v. Knight, 140 Ill. 232; Ramsdel v. Moore, 153 Ind. 393; Gilpatrick v. Glidden, 81 Me. 137; Gaither v. Gaither, 3 Md. Ch. 158; Campbell v. Brown, 129 Mass. 23, 26; Hooker v. Axford, 33 Mich. 453; Ragsdale v. Ragsdale, 68 Miss. 92; Smullin v. Wharton, 103 N. W. Rep. 288, 73 Neb. 667; Carver v. Todd, 48 N. J. Eq. 102; Norton v. Mallory, 63 N. Y. 434; Collins v. Barton, 20 Oh. 492; McAuley's Estate, 184 Pa. St. 124; Rutledge v. Smith, 1 McCord, Eq. (S. C.) 119; McLellan v. McLean, 2 Head (Tenn.), 684.

But see, *contra*, Moore v. Campbell, 102 Ala. 445; Orth v. Orth, 145 Ind. 184.

reparation for the tort by a conveyance to the intended beneficiary.¹ If, on the other hand, the devisee has acquired the property with the intention of fulfilling his promise, but afterwards decides to break it, relying on the statute as a defense, he commits no tort, but a purely passive breach of contract. Equity should not compel the performance of this contract at the suit of the beneficiary, because the statute forbids. But, notwithstanding this honest acquisition of the land, the devisee cannot honestly retain it, and equity should compel him to surrender it to the heir as the representative of the testator. It is quite possible that the courts, in giving C. the benefit of the trust in cases of devises by A. to B. upon an oral trust for C., and in refusing him any relief in cases of similar conveyances *inter vivos*, were influenced by the practical consideration that in the latter case the grantor, recovering his property by the principle of restitution, would still be in a position to accomplish his purpose, whereas in the case of the devise the accomplishment of his purpose would depend wholly upon the will of his heir. This view finds confirmation in a recent New York case,² in which the grantee in a conveyance executed by one upon his deathbed agreed orally to deal with the property for the benefit of a third person, and was compelled by the court to carry out his promise.

3. Conveyances by the seller, by direction of the buyer, to a third person.

In the old days of uses, when the title to the bulk of the land in England was not in the owners but in feoffees to the use of the owners, it was natural to presume, as the courts did presume, that one who received a conveyance from a seller by the direction of the buyer was to hold in trust for the buyer. But after the extirpation of uses by the Statute of Uses in 1536, the custom of the country changed, nor did it revive with the introduction, a century later, of the modern passive trust. Accordingly, after the Statute of Uses there was no reason for any presumption that the grantee of a seller was a trustee for the one who paid the purchase money. But the courts, nevertheless, continued to raise the presumption, and furthermore treated this presumption of fact, based upon the

¹ Crossman v. Keister, 79 N. E. Rep. 58, 223 Ill. 69; Newis v. Topfer, 121 Ia. 439; Wall v. Hickly, 112 Mass. 171; Pollard v. McKenney, 69 Neb. 742.

² Ahrens v. Jones, 169 N. Y. 555.

supposed intention of the parties, as if it were a rule of law, so that these presumed trusts arising from the payment of the purchase money were deemed to be trusts by operation of law and therefore within the exception to the statute of frauds. This doctrine was criticized by CHANCELLOR KENT in *Boyd v. McLean*,¹ and in several States has been modified by legislation. The statutes, however, differ in form and effect.

In Indiana and Kansas the statute abolishes the presumption of a trust resulting from the mere fact that one person pays the purchase money for a conveyance to another, but provides expressly that whenever the trustee actually agrees, although only by word of mouth, to hold in trust for the buyer, the trust is valid.²

In Kentucky the statute abolishes not only the presumption of a trust, but the trust itself, providing, however, that the grantee, who refuses to perform the oral trust, shall reimburse the buyer for the purchase money paid by him to the seller.³

In Michigan and Minnesota the statute abolishes the trust and gives the buyer no relief of any kind against the grantee, thereby working a forfeiture upon the confiding buyer to the unmerited profit of the faithless grantee.⁴

The language of the New York statute is almost identical with that of the Michigan and Minnesota statutes, but the courts are not agreed as to its effect. In some cases the statute has been interpreted, in accordance with the Michigan and Minnesota decisions, as penalizing the buyer to the advantage of the grantee.⁵ In others the courts have declared that the statute has merely abolished the presumption of a resulting trust, and does not prevent the creation of a valid trust, if there was in fact an agreement, although not in writing, that the grantee was to be a trustee for the buyer.⁶ This

¹ 1 Johns. (N. Y.) 582, 585.

² *Glidewell v. Spough*, 26 Ind. 319; *Franklin v. Colley*, 10 Kan. 260.

³ *Martin v. Martin*, 5 Bush (Ky.), 47, 56; *Manners v. Bradbury*, 81 Ky. 153, 157.

⁴ *Groesbeck v. Seeley*, 13 Mich. 329; *Newton v. Sly*, 15 Mich. 391; *Winans v. Winans*, 99 Mich. 74; *Chapman v. Chapman*, 114 Mich. 144; *Irvine v. Marshall*, 7 Minn. 286; *Johnson v. Johnson*, 16 Minn. 512; *Haaven v. Hoas*, 60 Minn. 313; *Anderson v. Anderson*, 81 Minn. 329; *Ryan v. Williams*, 92 Minn. 506.

⁵ *Hurst v. Harper*, 14 Hun (N. Y.), 280; *Stebbins v. Morris*, 23 Blatchf. (U. S.) 181; *Simon v. Schurck*, 29 N. Y. 598, 611.

⁶ *Gage v. Gage*, 83 Hun (N. Y.), 362; *Smith v. Balcom*, 24 N. Y. App. Div. 437 (*semble*); *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402; *aff.* 163 N. Y. 574.

In New York, if the grantee takes the title, agreeing orally with the buyer to hold

interpretation, it will be seen, gives to the New York statute the same effect which is secured in express terms by the Indiana and Kansas statutes.

Of these three statutory doctrines it may be said that the Michigan and Minnesota rule is shockingly unjust in enriching the faithless grantee at the expense of the trusting buyer; that the Kentucky rule is a close approximation to justice; and that the Indiana and Kansas rule does complete justice. This rule also makes for consistency in the law; for it is everywhere agreed that if the grantee takes the conveyance as a security for a debt due from the buyer, however small the debt or however valuable the land, he cannot, although he repudiates his agreement to reconvey upon payment of the debt, keep the land after payment or tender by the buyer. On the other hand, in Michigan and Minnesota, and possibly in New York, the gratuitous grantee who breaks faith with the buyer may keep the land, while the equally faithless grantee who took the title as security and who is paid off must surrender the land.

It is a step forward, even if a short step, to abolish the artificial presumption of a resulting trust because of the mere payment of the purchase money, for such a presumption favors the buyer unduly. But it is a long step backward to declare that the statute penalizes the innocent buyer to the aggrandizement of the unconscionable grantee. Nor is such a declaration called for by the language of the statute. The provision that there shall be no resulting trust in favor of the purchaser against the grantee, means simply that the law shall not enforce the trust based upon the presumed intention of the parties, — that is, a trust implied in fact, which would arise, if at all, at the time of the payment of the purchase money. But the constructive trust created to prevent the dishonest enrichment of the grantee at the expense of the buyer is enforced in defiance of the grantee's intention, arises only after the grantee has repudiated the intended trust, and is protected by another

it in trust for a third person, the latter may enforce the trust. *Siemon v. Schurck*, 29 N. Y. 598; *Gilbert v. Gilbert*, 2 Abb. App. (N. Y.) 256; *McCahill v. McCahill*, 11 N. Y. Misc. 258. This result seems as unwarranted by the statute as it is by the decisions prior to the statute. In Michigan and Minnesota the third person gets, in such a case, no rights. *Shafter v. Huntington*, 53 Mich. 310; *Connelly v. Sheridan*, 41 Minn. 18. Upon the sound principle of *restitutio in integrum*, it is submitted, the grantee should be charged as a constructive trustee for the buyer. See *Randall v. Constans*, 33 Minn. 329, 336-338.

provision of the statute excepting trusts arising by operation of law from the prohibition of the statute.

It is to be hoped, therefore, that the later New York decisions on this point may prevail over the earlier ones. It is greatly to be wished, also, that the simple principle which requires every one, who is unassailable because of the statute of frauds for the breach of his express trust or promise, to make restitution, *in specie* if practicable, otherwise in value, of whatever he has received upon the faith of his oral undertaking, might receive widespread recognition and appreciation. Such recognition and appreciation would have helped greatly in simplifying the law and promoting justice in the three classes of trusts under consideration in this article.

LAW AND MORALS.¹

PRIMITIVE law regards the word and the act of the individual; it searches not his heart. "The thought of man shall not be tried," said CHIEF JUSTICE BRIAN, one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man."²

As a consequence early law is formal and unmoral. Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases? To answer this question let us consider, first, the rule of liability for damage caused to one person by the act of another. Not quite six hundred years ago an action of trespass was brought in the King's Bench for a battery. The jury found that the plaintiff was beaten, but that this was because of his assailing the defendant who had acted purely in self-defense, and that the action was brought out of malice. It was nevertheless adjudged that the plaintiff should recover his damages according to the jury's verdict, and that the defendant should go to prison. The defendant had committed the act of battery; therefore he must make reparation. He was not permitted to justify his act as done in protecting himself from the attack of the plaintiff. That attack rendered the plaintiff liable to a cross action, but did not take away his own action.

The case we have just considered was an action for compensation for a tort. Suppose, however, that the defendant, instead of merely injuring his assailant, had killed him in self-defense, using no unnecessary force. Did the early English law so completely ignore the moral quality of the act of killing in self-defense as to make it a crime? Strictly speaking, yes. An official reporter of the time of Edward III.³ and Lord Coke⁴ were doubtless in error in stating that prior to 1267 a man "was hanged in such a case

¹ From an address delivered at the seventy-fifth anniversary of the Cincinnati Law School, and reprinted (by permission of the University of Cincinnati Record) in the Harvard Law Review for December, 1908.

² Y. B. 7 Ed. IV. f. 2, pl. 2.

³ Y. B. 21 Ed. III. f. 17, pl. 22.

⁴ Coke, Second Inst., 148.

just as if he had acted feloniously." But such killing was not justifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison, and must trust to the king's mercy for a pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime. But the moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal, or that he should have to make compensation to his culpable assailant. By 1400 self-defense had become a bar to an action for a battery. Pardons for killing in self-defense became a matter of course; ultimately the jury was allowed to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out.

Let us test the rule of liability by another class of cases. One person may have injured another without fault on either side, by a pure accident. The case against the actor in such a case is obviously stronger than against one who inflicts damage in self-defense. Accordingly we are prepared for this language of the Statute of Gloucester, 6 Ed. I., c. 9 (1278): "If one kills another in defending himself, or by misadventure, he shall be held liable, but the judge shall inform the king, and the king will pardon him, if he pleases."¹ *A fortiori* the actor was bound to make compensation to the victim of the accident. The criminal liability disappeared comparatively early, as in the case of killing in self-defense. But the doctrine of civil liability for accidental damage caused by a morally innocent actor was very persistent. It was stated forcibly by an eminent judge in 1681 as follows: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering. If a man shoot at butts and hurt a man unawares an action lies. . . . If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there '*Actus non facit reum, nisi mens sit rea.*'"² As pointed out by Sir Frederick Pollock, in his treatise on torts,³ a similar opinion was expressed subsequently by Blackstone, Erskine, Mr. JUSTICE GROSE, and as late as 1868 by LORD CRANWORTH. Erskine's statement goes very

¹ See also Y. B. 2 Hen. IV. f. 18, pl. 6, per THIRNING, C. J.

² Lambert v. Bessey, T. Ray. 421.

³ 8th ed., 142.

far: "If a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an *indictment* for trespass, but he must answer in an *action* for everything he has broken." There were, however, from time to time certain intimations from the judges that in the absence of negligence, an unintentional injury to another would not render the actor liable, and finally in 1891 a case was brought in the Queen's Bench¹ which required the court to decide whether the old rule of strict liability was still in force or must give way to a rule of liability based upon moral culpability. The defendant, one of a hunting party, fired at a pheasant. The shot, glancing from the bough of an oak-tree, penetrated the eye of the plaintiff, destroying his sight. The jury found that the defendant had not acted negligently, and the court decided that the defendant was not liable. The same result was reached in Massachusetts forty years earlier,² and this precedent has been followed in other states.

So that to-day we may say that the old law has been radically transformed. The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of to-day, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril. Nor is the modern ethical doctrine applied even now to all cases logically within its scope. Under this doctrine a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another. The lunatic homicide ceased to forfeit his goods or to require the king's pardon centuries ago. But there is no English decision that a lunatic need not make reparation to one injured by his act. There is, to be sure, no English decision to the contrary; but there are several *dicta* against the lunatic, and an unreasoning respect for these *dicta* has led to several regrettable decisions in this country and in the British Colonies. These decisions must be regarded as survivals of the ancient rule that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that

¹ Stanley v. Powell, [1891] 1 Q. B. 86.

² Brown v. Kendall, 6 Cush. (Mass.) 292.

the lunatic, not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault. The continental law upon this point is instructive. By the early French and German law the lunatic was liable as in England for damage that he caused to another. In France to-day the lunatic is absolutely exempt from liability. The new German Code has a general provision to the same effect, but this code, resembling in this respect the law of Switzerland and Portugal, makes this qualification of the rule of non-liability. If compensation cannot be obtained from the person in charge of the lunatic, the court may order the lunatic to pay such compensation as seems equitable under the circumstances, having regard especially to the relative pecuniary situation of the parties, and so that the lunatic shall not in any event be deprived of the means of maintaining himself in accordance with his station in life, or of complying with his legal duties as to the maintenance of others. This compulsory contribution by the rich lunatic to his poor victim with freedom from liability in other cases may well prove to give the best practical results.

We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor. The history of the law of contracts exhibits a similar transformation in the legal significance of the written or spoken word. By the early law, in the absence of the formal word, there was no liability, however repugnant to justice the result might be. On the other hand, if the formal word was given, then the giver was bound, however unrighteous, by reason of the circumstances under which he gave it, it might be to hold him to his promise. The persistence of this unmoral doctrine in the English law is most surprising. As late as 1606 the plaintiff brought an action alleging that the defendant, a goldsmith, sold him a stone affirming it to be a bezoar stone, whereas it was not such a stone. The court gave judgment against the plaintiff on the ground "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action."¹ The buyer reasonably supposed

¹ *Chandler v. Lopus*, Dy., 75 a, n. 23; *Cro. Jac.* 4.

that he was getting a valuable jewel for his hundred pounds, but he must pocket his loss, since the goldsmith did not use the magic words "I warrant" or "I undertake." To-day, of course, the sale of a chattel as being of a particular description implies a warranty or undertaking to that effect. But the notion of implying a promise from the conduct of the party was altogether foreign to the mental operations of the medieval lawyer. For this reason the buyer took the risk of the seller's not being the owner of the property sold unless the seller expressly warranted the title. In the case of goods the mere selling as owner is to-day a warranty of title, but the rules of real property not being readily changed the archaic law still survives in the case of conveyances of land, the grantee being without remedy if there is no covenant of title in the deed. The inability to imply a promise from the conduct of the parties explains this remark of CHIEF JUSTICE BRIAN: "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me."¹ Similarly in the reign of Elizabeth a gentleman of quality put up at an inn with his servants and horses. But no price was agreed upon for his accommodations. The gentleman declining to pay, the innkeeper could obtain no relief at law.² Neither the customer nor the guest had made an express promise to pay. The law could not continue in this state. It was shocking to the moral sense of the community that a man should not pay for what was given him upon the mutual understanding that it should be paid for. Accordingly the judges at length realized and declared that the act of employing a workman, ordering goods, or putting up at an inn meant, without more, an undertaking to make reasonable compensation.

There is a certain analogy between the ethical development of the law and that of the individual. As early law is formal and unmoral, so the child or youth is wont to be technical at the expense of fairness. This was brought home to me once by an experience with one of my sons, then about twelve years old. I asked him one day about his plans for the afternoon, and he told me he was to play tennis with his friend John. In the evening, when asked if he had had a good afternoon with John, he said, "Oh, I haven't been with him. I thought I would rather play with Willie." "But did n't John expect you?" "Yes, I suppose he did." "Was it

¹ Y. B. 12 Ed. IV., f. 9, pl. 22.

² *Young v. Ashburnham*, 3 Leon. 161.

quite right, after you had led him to expect you, to disappoint him?" "Oh, but I did n't promise him that I would come." Remembering Chief Justice Brian, I was lenient with the boy.

The significance of the written word in the early law is illustrated by the rule that one who claimed the benefit of a promise under seal must produce it in court. The promise under seal was regarded not as evidence of the contract, but as the contract itself. Accordingly, the loss or destruction of the instrument would logically mean the loss of all the promisee's rights against the promisor. And such was the law: "When the action is upon a specialty, if the specialty is lost the whole action is lost," is the language of a Year Book judge.¹ The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, but not until the seventeenth century.² A century later the common law judges, by judicial legislation and against the judgment of LORD ELDON, allowed the obligee to recover upon secondary evidence of a lost specialty.

The formal and unmoral attitude of the common law in dealing with contracts under seal appears most conspicuously in the treatment of defenses based upon the conduct of the obligee. As the obligee, as we have seen, who could not produce the specialty, was powerless at common law against the obligor, who unconscionably refused to fulfill his promise, so the obligor who had formally executed the instrument was at common law helpless against an obligee who had the specialty, no matter how reprehensible his conduct in seeking to enforce it. In 1835, in an English case, the defendant's defense to an action upon a bond, that it had been obtained from him by fraudulent representations, was not allowed, LORD ABINGER saying: "You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defense is unavailing when once it is shown that the party knew perfectly well the nature of the deed which he was executing."³

Similarly, in an action upon a specialty, it was no defense at common law that the consideration for it had failed.⁴ Nor that it

¹ Y. B. 24 Ed. III., f. 24, pl. 1.

² See 9 Harvard Law Review, 50, n. 1.

³ *Mason v. Ditchbourne*, 1 M. & Rob. 460. ⁴ See 9 Harvard Law Review, 52.

was given for an illegal or immoral purpose, if this did not appear upon the face of the instrument.¹ How completely ethical considerations were ignored by the common law judges in dealing with formal contracts is shown by the numerous cases deciding that a covenantor who had paid the full amount due on the covenant, but without taking a release or securing the destruction or cancellation of the instrument, must, nevertheless, pay a second time if the obligee was unconscionable enough to bring an action.² In the eye of the common law in all these cases the defendant had given the specialty to the plaintiff intending it to be his: the plaintiff still had it; therefore, let him recover the fruit of his property. In all these cases, however, equity sooner or later gave relief. Equity recognized his common law property right in the specialty, but, because of his unconscionable acquisition or retention of it, commanded him, under pain of imprisonment, to abstain from the exercise of his common law right. Finally, by legislation in England and in nearly all our States, defendants were allowed to plead at common law, as equitable defenses, facts which would have entitled them to a permanent, unconditional injunction in equity. It is to be observed, however, that there is no federal legislation to this effect, so that it is still true that in the federal courts fraud cannot be pleaded in bar of a common law action upon a specialty, the only remedy of the defendant being a bill in equity for an injunction to restrain the action.³

The illustrations, thus far considered, of the unmoral character of the early common law exhibit that law in its worst aspect, as an instrument of injustice, as permitting unmeritorious or even culpable plaintiffs to use the machinery of the court as a means of collecting money from blameless defendants.

Let us turn from the sins of commission to some of the sins of omission in the common law, and consider how these defects in the law were cured.

The early common law, as might be supposed, gave fairly adequate remedies for the infringement of the rights of personal safety or personal liberty, and also for the violation of the rights to or in tangible property. But for injuries to one's reputation or damage to one's general welfare or pecuniary condition the relief was of the

¹ See 9 *Harvard Law Review*, 52.

² *Ibid.* 54.

³ *Ibid.* 51.

slightest. Suppose, for example, a person circulated a false story that a tradesman cheated by giving false measure, or that a servant had stolen from his master, in consequence of which the tradesman lost his customers or the servant his place. The common law prior to 1500 gave no redress against the slanderer.¹ If a buyer was induced by the fraudulent representations of the seller to give a large price for a worthless chattel, he could for centuries maintain no action for damages against his deceiver.² Not until near the end of the seventeenth century could an innocent man who had been tried and acquitted upon an indictment for murder or other crime obtain compensation for the ignominy and damage to which he had been subjected, although it was clear that the defendant had instigated the criminal prosecution malevolently, and knowing that the plaintiff was innocent.³ Prior to the reign of Henry VII. there was no action for the breach of a promise not under seal, although given for a consideration.⁴ Sooner or later the law was changed and the courts allowed an action for damages in all these cases. These innovations were not, however, the result of successive statutes passed to satisfy the popular demand for reform at the time. On the contrary, they were all the product of a few lines in a statute enacted near the end of the thirteenth century, providing that "Whensoever from thenceforth a writ shall be found in the Chancery, and in a like case falling under the same right and requiring a like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors."⁵ This beneficent statute of Edward I., the origin of all our actions of trespass on the case, has been the great reforming agency in supplying the defects of the common law. Upon this statute is based our whole law of actions for defamation, for malicious prosecution and for deceit, as well as the whole law of assumpsit, which came practically to be the remedy for all modern contracts except contracts under seal. Of the great number of applications of the Statute of Westminster these actions on the case for defamation, deceit, malicious prosecution, and breach of promise, together with the action for nuisances, are the ones which, more

¹ Y. B. 17 Ed. IV., f. 3, pl. 2; Y. B. 27 Hen. VIII., f. 14, pl. 4.

² See 2 Harvard Law Review, 9.

³ Savile v. Roberts, 1 Ld. Ray. 374.

⁴ 2 Harvard Law Review. 13.

⁵ St. Westminster 2, 13 Ed. I., c. 24.

than all others, have contributed to the beneficent expansion of the common law. Even after these great innovations there were many grievous defects in the common law scheme of remedies for damage inflicted upon one person by the reprehensible act of another. Until the time of Lord Holt, one who had suffered from the unauthorized misconduct of a servant acting within the scope of his employment could obtain no compensation from the master.¹ The earliest suggestions of relief against the unauthorized printing by a stranger of the unpublished work of an author are in the second quarter of the eighteenth century.² Prior to 1745, no husband whose wife had been induced to leave him by the wrongful persuasion of another had ever recovered compensation from the disturber of the marriage relation.³ Not until twenty years after the establishment of this school would an action lie against one who wantonly or selfishly induced a person under contract with the plaintiff to break the contract.⁴ As recently as 1874 the English court decided for the first time that one who untruthfully disparaged the goods of a tradesman must make compensation for the resulting damage.⁵ In all these cases the remedy when finally introduced by the court was in the form of the action on the case, sanctioned by the Statute of Edward I.

Is this statute, now more than six hundred years old, still a living force for the betterment of the common law in England and the United States? There can be but one answer to that question. [This statute is a perennial fountain of justice to be drawn upon so long as, in a given jurisdiction, instances may be pointed out in which the common law courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act of another, and the continued absence of a remedy would shock the moral sense of the community.]

But with everything done that could be done by this statute, our law as a whole would have been a very imperfect instrument of justice if the system of common law remedies had not been supplemented by the system of equitable remedies. Blackstone has asserted that the common law judges by a liberal interpretation of the Statute of Westminster by means of the action on the

¹ *Boson v. Sanford*, 2 Salk. 440.

² *Webb v. Rose*, 3 Sw. 674; 1 Ames, *Cases in Eq. Jur.*, 659.

³ *Winsmore v. Greenbank*, Willes, 577.

⁴ *Lumley v. Gye*, 2 E. & B. 216.

⁵ *Western Co. v. Lawes Co.*, L. R. 9 Ex. 218.

case might have done the work of a court of equity. Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts *in rem*, while equity acts *in personam*. The difference between the judgment at law and the decree in equity goes to the root of the whole matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages, because they are his. Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make compensation for his wrong. It is this higher standard of morality that equity enforces wherever the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant by injunction to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy.

The great bulk of the exclusive jurisdiction of equity falls under two heads, Bills for Restitution and Bills for Specific Performance. The object of bills for restitution is to compel the surrender by the defendant of property wrongfully obtained from the plaintiff, or of property properly acquired but improperly retained because of some misconduct after its acquisition. Bills for restitution are very ancient. In the fourteenth and fifteenth century there were bills for the reconveyance of property acquired by fraud or mistake or retained by a defendant after failing to give the stipulated equivalent for the property.¹ Somewhat later we find bills to re-

¹ 21 Harvard Law Review, 262.

strain the enforcement and compel the surrender of specialty contracts obtained fraudulently, illegally, or by mistake, or retained after payment or in spite of failure of consideration.¹ Early in the seventeenth century LORD ELLESMERE, in his famous controversy with LORD COKE, established the right to restrain the enforcement of a common law judgment obtained by fraud.² In this same century mortgagees were compelled to surrender the mortgaged property notwithstanding the default of the mortgagor and in disregard of the express agreement of the parties, upon payment of the mortgage debt and interest,³ and to prevent a similar hardship, holders of penal bonds were compelled to give them up without exacting the penalty.⁴ In the eighteenth century, without proof of any fraudulent misrepresentation, decrees for reconveyance were made upon the ground of undue influence, growing out of the relations of the parties, as in the case of conveyances by client to attorney, ward to guardian, child to parent and the like. And in the last century grantees, who had acquired property by innocent misrepresentation, were obliged to restore it to their grantors.⁵ The relief in these cases consists in undoing the original transaction and restoring the *status quo*, a result, of course, not anticipated by either party at the outset. In other words, equity treated the defendant as holding the property upon a constructive trust for the plaintiff.

On the other hand, bills against express trustees form the staple of the exercise of the exclusive jurisdiction of equity by way of specific performance. Equity began to enforce the performance of uses and trusts soon after 1400.⁶

In giving relief by decrees for restitution against constructive trustees, or by decrees for specific performances against express trustees, equity has acted upon the highly moral principle that no one should, by the wrongful acquisition or retention of a title, unjustly enrich himself at the expense of another.

In the cases thus far considered this doctrine of unjust enrichment was enforced against the original grantee of the property and because of his misconduct in the relation between him and the

¹ 9 Harvard Law Review, 51, 52, 54-55.

² Wilson, Life of James I., 94, 95; ² Campbell, Lives of Lord Chancellors, 241.

³ 1 Spence, Eq. Jur., 602-603.

⁴ *Ibid.* 629.

⁵ Redgrave v. Hurd, 20 Ch. D. 1.

⁶ 21 Harvard Law Review, 265.

grantor. But it is a long-established principle that anyone who acquires property from another who, as he knows, holds it subject to a trust or other equity, and also anyone who, without such knowledge, acquires property so held, if he gives no value for it, may be compelled himself to perform the trust or other equitable obligation. It is true there is no direct relation between the equitable claimant and the buyer with notice or the donee without notice. But if the one could knowingly acquire, or the other knowingly keep, the property free from the trust or other equity, he would be profiting unconscionably at the expense of the *cestui que trust* or other equitable claimant. These applications of the doctrine of unjust enrichment are good illustrations of the highly moral quality of equity jurisdiction. They are almost unknown to the Roman law, and are but imperfectly recognized in modern continental law.

There is another doctrine of equity which has only a limited operation in countries whose law is based on the Roman law, the doctrine that no one shall make a profit from the violation of an equitable duty, even though he is ready to make full compensation to him whose equitable right he has infringed. A trustee, for example, of land worth \$5,000 in breach of trust conveys it to a purchaser for value without notice of the trust, receiving in exchange fifty shares of corporate stock. The shares appreciate and become worth \$10,000, while the land depreciates to \$3,000. The delinquent trustee may be compelled to surrender the shares to the *cestui que trust*, although the latter thereby gets \$7,000 more than he would have had if there had been no breach of trust. If the shares had depreciated and the land appreciated, the *cestui que trust* would be entitled to the increased value of the land. It is a wholesome principle that whatever the misconducting trustee wins he wins for his beneficiary, and whatever he loses he loses for himself.

The equitable rules which prohibit a fiduciary, while in the performance of his fiduciary duty, from competing in any way with the interest of his beneficiary, and permit dealings between them only upon clear evidence of the good faith of the fiduciary, and of a complete disclosure of all his knowledge as to the matters entrusted to him, and in fact the whole law of equity as to fiduciaries, enforce a moral standard considerably in advance of

that of the average business man. Enough has been said to make plain that much as our law owes to the action on the case for its ethical quality, it is to the principles of the court of equity, acting upon the conscience of the defendants, and compelling them by decrees of restitution and specific performance to do what in justice and right they ought to do, that we must look to justify our belief that the English and American systems of law, however imperfect, are further on the road to perfection than those of other countries.

In considering the possibility of further improvements of the law we must recognize at the outset that there are some permanent limitations upon the enforcement in the courts of duties whose performance is required in the forum of morals.

On grounds of public policy there are and always will be, on the one hand, many cases in which persons damaged may recover compensation from others whose conduct was morally blameless, and, on the other hand, many cases in which persons damaged cannot obtain compensation even from those whose conduct was morally most reprehensible.

Instances of unsuccessful actions against persons free from fault readily suggest themselves. The master, who has used all possible care in the selection of his servants, is liable for damage by them when acting within the scope of their employment, although they carelessly or even wilfully disregard his instructions. The business is carried on for the master's benefit, and it is thought to be expedient that he, rather than a stranger, should take the risk of the servant's misconduct. One keeps fierce, wild animals at his peril, and also domestic animals, after knowledge that they are dangerous. By legislation, indeed, in several States, one who keeps a dog must make three-fold compensation, in one State ten-fold compensation, for damage done by the dog, without proof of the keeper's knowledge of its vicious quality. The sheep farmers must be encouraged, even if some innocent persons have to pay dearly for the luxury of keeping a dog. A Massachusetts bank was entered by burglars who carried off and put into circulation a large quantity of bank notes which had been printed but never issued by the bank. The bank had to pay these notes. The bank must safeguard the notes it prints at its peril, to prevent the possibility of a widespreading mischief to the general public.

The results in these cases are much less disturbing to one's sense of fairness than in those in which the innocent victims of the unrighteous are allowed no redress. For example, a will is found after a man's death giving all his property to his brother. In the same box with the will is a letter, not referred to in the will, addressed to the brother, telling him that he is to hold the property in trust for their sister. The brother insists upon keeping the property for himself. The court is powerless to help the defrauded sister. The rule that the intention of the testator must be found exclusively in the duly-witnessed document, in view of the danger of perjury and forgery, is the best security for giving effect to the true will of the generality of testators. The defenses of infancy, statute of frauds, statute of limitations, or that a promise was gratuitous are only too often dishonorable defenses, but their abolition would probably increase rather than diminish injustice. An English judge said from the bench: "You are a harpy, preying on the vitals of the poor." The words were false and spoken for the sole purpose of injuring the person addressed. The latter could maintain no action against the judge. It is believed to be for the public interest that no judge should be called to account in a civil action for words spoken while on the bench.

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed. That is why, in the cases just considered and others that will occur to you, the innocent suffer and the wicked go unpunished.

But unless exempted from liability by considerations of enlightened public policy, I can see no reason why he who has by his act wilfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim.

Has this principle become a part of our law? Let us consider a few concrete cases. A man kills his daughter in order to inherit her real estate. Under the statute the land descends to him as her heir. May he keep it? It seems clear that equity should compel him to surrender the property. As it is impossible to make specific reparation to the deceased, he should be treated as a constructive trustee for those who represent her, that is, her heirs, the murderer being counted out in determining who are the heirs. But

in several States the murderer is allowed to keep the fruits of his crime.¹

A handsome, modest young lady is photographed without her consent and her likeness is reproduced and sent broadcast through the land as part of an advertising label with the legend, "The Flower of the Family," placed upon thousands of barrels of flour. Here, too, the courts are divided as to whether she should have relief. It being well settled and properly settled that the recipient of a letter commits a tort if he publishes it without the consent of the writer, there should be little difficulty in preventing the greater invasion of privacy in using the portrait of a modest girl as an advertising medium. Suppose, again, that the owner of land sinks a well, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or that he erects an abnormally high fence on his own land, but near the boundary, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct his view. Is the landowner responsible to his neighbor for the damage arising from such malevolent conduct? In thirteen of our States he must make compensation for malevolently draining the neighbor's spring. In two other States the opposite has been decided. In four States one who erects a spite fence must pay for the damage to the neighbor. In six others he incurs no liability. Six States have passed special statutes giving an action for building such a fence. In Germany and France and in other continental countries an action is allowed against the landowner in both cases.

The principle I have suggested would allow relief in all of these cases, and its adoption by the courts is fairly justified by the rules of equity and the Statute of Edward I. This principle is very neatly expressed in the new German Code: "Any act done wilfully by means of which damage is done to another in a manner *contra bonos mores* is an unlawful act."

To put quite a different case, should statutes be passed giving compensation by the State to an innocent man for an unmerited conviction and punishment? The State, it is true, has merely done its duty in carrying through the prosecution. But the prosecution was made for the benefit of the community, and is it not just that the community rather than an innocent member of it should pay

¹ 36 Am. L. Reg. and Rev. 225; *Wellner v. Eckstein*, 117 N. W. 830, 105 Minn. 444 (two judges dissenting). In New York the rule is the other way.

for its mistakes? By recent legislation Germany has provided compensation for the innocent sufferer in such cases.

In these cases in which it is suggested that the person damaged ought to recover compensation, the damage was caused by the wilful act of the party to be charged. It remains to consider whether the law should ever go so far as to give compensation or to inflict punishment for damage which would not have happened but for the wilful inaction of another. I exclude cases in which, by reason of some relations between the parties like that of father and child, nurse and invalid, master and servant and others, there is a recognized legal duty to act. In the case supposed the only relation between the parties is that both are human beings. As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime, and must I make compensation to the widow and children of the man drowned and to the wounded child? Macaulay, in commenting upon his Indian Criminal Code, puts the case of a surgeon refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that, if it were not performed, the person who required it would die.

We may suppose again that the situation of imminent danger of death was created by the act, but the innocent act, of the person who refuses to prevent the death. The man, for example, whose eye was penetrated by the glancing shot of the careful pheasant hunter, stunned by the shot, fell face downward into a shallow pool by which he was standing. The hunter might easily save him, but lets him drown.

In the first three illustrations, however revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger. As the law stands to-day there would be no

legal liability, either civilly or criminally, in any of these cases. The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not.

But ought the law to remain in this condition? Of course any statutory duty to be benevolent would have to be exceptional. The practical difficulty in such legislation would be in drawing the line. But that difficulty has continually to be faced in the law. We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad track could be punished and be made to compensate the widow of the man drowned and the wounded child. We should not think it advisable to penalize the surgeon who refused to make the journey. These illustrations suggest a possible working rule. One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death. The case of the drowning of the man shot by the hunter differs from the others in that the hunter, although he acted innocently, did bring about the dangerous situation. Here, too, the lawyer who should try to charge the hunter would lead a forlorn hope. But it seems to me that he could make out a strong case against the hunter on common law grounds. By the early law, as we have seen, he would have been liable simply because he shot the other. In modern times the courts have admitted as an affirmative defense the fact that he was not negligent. May not the same courts refuse to allow the defense, if the defendant did not use reasonable means to prevent a calamity after creating the threatening situation? Be that as it may, it is hard to see why such a rule should not be declared by statute, if not by the courts.

It is obvious that the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work. It is worth while to realize the great ethical advance of the English law in the past, if only as an encouragement to effort for future improvement. In this work of the future there is an admirable field for the law professor. The professor has, while the

judge and the practicing lawyer have not, the time for systematic and comprehensive study and for becoming familiar with the decisions and legislation of other countries. This systematic study and the knowledge of what is going on in other countries are indispensable if we would make our system of law the best possible instrument of justice. The training of students must always be the chief object of the law school, but this work should be supplemented by solid contributions of their professors to the improvement of the law.

UNDISCLOSED PRINCIPAL — HIS RIGHTS AND LIABILITIES.¹

THE doctrine that an undisclosed principal may sue and be sued upon contracts made by his agent, as ostensible principal, with third parties, is so firmly established in the law of England and of this country, that it would be quixotic to attack it in the courts. Nevertheless, whenever an established doctrine ignores, as this doctrine of the undisclosed principal ignores, fundamental legal principles, it is highly important that it should be recognized as an anomaly, to be reckoned with of course, but not to be made the basis of analogical reasoning. Unfortunately, a majority of the judges and of the writers upon Agency and Contracts state the rule as to the right and liability of the undisclosed principal without any discussion of its soundness. LORD CAIRNS,² indeed, and Sir William Anson³ accept its soundness as self-evident.

On the other hand, LORD DAVEY,⁴ LORD LINDLEY⁵ and SMITH, L. J.,⁶ in their judgments have treated the rule as an anomaly, and Mr. Tiffany,⁷ Mr. Huffcut,⁸ Mr. Lewis⁹ and Sir Frederick Pollock have expressed a similar opinion in their writings. The latter condemns it in these strong terms: "The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract. The right of one person to sue another on a contract not really made with the person suing is unknown to every legal system except that of England and America."¹⁰

This language, it is submitted, is not at all too strong. Let us

¹ Reprinted by permission from the Yale Law Journal for May, 1909.

² *Kendall v. Hamilton*, 4 App. Cas. 504, 514.

³ *Anson, Cont.*, 2d ed., 346.

⁴ *Keighley v. Durant* (1901), A. C. 240, 256.

⁵ *Keighley v. Durant* (1901), A. C. 240, 261.

⁶ *Durant v. Roberts* (1901), 1 Q. B. 629, 635. See also LORD BLACKBURN's words in *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 604.

⁷ *Tiffany, Agency*, 232-233.

⁸ *Huffcut, Agency*, 166.

⁹ *Columbia Law Review*, 116, 130.

¹⁰ 3 L. Q. Review, 359. See also 14 L. Q. Review, 5.

analyze the common case of a sale on credit of specified goods by A. to B., who, without A.'s knowledge, is buying for the benefit of C. The title to the goods sold must pass from A. to B., because that was the declared intention of both parties. The actual transaction is, therefore, a sale by A. to B. But this sale by A. to B. excludes the possibility of the sale of the same goods by A. to C.¹ In other words, A. could prove a count for goods sold to B. in an action against B., but could not prove a count for goods sold to C. in an action against C. The rule, therefore, which permits A. to charge either B. or C. at his option, permits a plaintiff to recover on his allegation regardless of his evidence.

But although B., and not C., acquires the legal title from A., B. holds that title from the outset for the benefit of C. The truth of the matter is, therefore, that B., in buying for an undisclosed principal, is not acting as an attorney or representative of his employer, but as his trustee. If we suppose the subject of the purchase to be land, this statement may be more convincing. When A. conveys the land to B., no one will say that the title passes to C. But B., who gets the title, does not hold it for himself, but as trustee for C. To say that A. may charge C. upon B.'s contract of purchase, is to maintain what no one would maintain, that a *cestui que trust* may be sued, and at law, upon contracts between the trustee and third persons.

The rule which permits the undisclosed principal to sue the third person, who has contracted with the agent, in ignorance of the agency, is no more defensible than that which sanctions a direct action by the third person against the undisclosed principal.

Suppose, for example, mutual promises by A. to sell and convey and by B. to buy a tract of land, B. acting for the benefit of C., but A. having no knowledge of this fact. A. certainly becomes bound to B. This is the necessary result of their declared inten-

¹ The impossibility of the sale of the same goods at the same moment both to the agent and to his principal, is illustrated by *Hinson v. Berridge*, Moore, 701, pl. 975, decided in 1595, when an action of assumpsit was not allowed, if the facts would support a count in debt. In this case, C., in consideration of the sale of 200 lambs by A. to B., the factor of C., at a price to be agreed upon by A. and B., promised to pay A. the said price. To an action of assumpsit on this promise C. objected that the action should have been in debt, as the sale was to him. "But all the judges *contra*, for the words are that he should sell to B. to the use of C., so the sale was to B., and the use is only a confidence, which does not give a title (property) at law, so that debt lies not against C., but assumpsit."

tions. It is equally clear that neither intended that A. should assume more than one obligation. It follows, therefore, that there can be no direct obligation of A. to C. Indirectly, indeed, C. may reap the fruits of this contract, for B. having acquired A.'s obligation for the benefit of C. holds it, from the moment of its acquisition, as a trust-*res*. Here again B. is acting not as the attorney, or representative, but as the trustee of C.

Logically, then, there is no direct relation between the undisclosed principal and the third person with whom the agent contracts. Only with the agent does the third person stand in the relation of obligor and obligee. Only the agent should sue, or be sued by, the third person. The soundness of these logical conclusions, and the unsoundness of the English and American doctrine to the contrary, find confirmation in the law of other countries. By the German law, the undisclosed principal cannot maintain an action against the third person with whom his agent has contracted unless the agent has assigned the claim to the principal;¹ and on the other hand, no action can be maintained by the third person against the undisclosed principal.² The French law is to the same effect,³ as is the law of Spain⁴ and other European countries.⁵

Even in England and America the anomalous rule by which one may sue or be sued upon a contract to which he is not a party, is of limited scope. No action may be brought, in those countries, by or against an undisclosed principal upon a contract under seal, upon a bill of exchange or promissory note, nor for dividends or assessments due to or from a shareholder of a corporation;⁶ nor even upon a simple contract when the agent, acting for several

¹ 1 Entscheidungen d. Reichs-Gerichts, No. 116; Staub, Commentar z. Handelsgesetzbuch, 1739.

² 2 Entscheidungen des Reichs-Gerichts, No. 43; 16 Entscheidungen des R. O. H. G., No. 24.

³ "Les tiers ne connaissent, ou sont censés ne connaître que le prétenom: c'est lui qui est leur créancier, lui qui est leur débiteur, lui qui est propriétaire des biens mis sous son nom. Ils ont donc le droit de le poursuivre et ils peuvent être poursuivis par lui; et, d'autre part, ils ne peuvent poursuivre que lui ou n'être poursuivis que par lui." 2 Planiol, Droit Civil, Sect. 2271. See also 21 Baudry-Lacantinerie, Droit Civil, Sect. 897.

⁴ Mildred v. Maspons, 8 App. Cas. 874, 887.

⁵ For the law of Lower Canada see V. Hudon Co. v. Canada Co., 13 Can. S. C. R. 401.

⁶ See Hinson v. Berridge, summarized, *supra*, 454, n. 1.

undisclosed principals, instead of making separate contracts in behalf of each, makes a single lump contract in behalf of all.¹ Moreover, this anomalous doctrine is a modern notion. There is no trace of it in the days when the action of debt was the normal remedy upon simple contracts. The agent of the undisclosed principal received the *quid pro quo* from the third person; he, therefore, and he only could be the debtor.² The first judicial sanction of the doctrine is by LEE, C. J., as late as 1743, in the *nisi prius* case of Schrimshire v. Alderton.³ This case is instructive by reason of the reluctance of the jury to accept the direction of the judge. The action was brought by the undisclosed principal for the price of goods sold by his factor. The buyer paid the factor, although the latter had failed and the principal had sent him notice not to do so. The judge "directed the jury in favor of the plaintiff. They went out and found for the defendant; were sent out a second, and a third time to reconsider it, and still adhered to their verdict; and being asked man by man, they separately declared they found for the defendant." Upon this a new trial was granted. "And at the sittings after this term, it came again before a special jury; when the Chief Justice declared that a factor's sale does by the general rule of law create a contract between the owner and the buyer. But notwithstanding this, the jury found for the defendant; and being asked their reasons, declared that they thought from the circumstances no credit was given as between the owner and the buyer, and that the latter was answerable to the factor only, and he only to the owner." This case recalls the earlier struggle of Lord Holt with the merchants as to the negotiability of promissory notes. In the later case as in the earlier one, the business men, although overridden by a masterful judge, were in the right. Alderton, the buyer, was the debtor of the factor, the latter holding his claim as trustee for the principal. The debtor was justified in paying the factor unless he had reason to suppose that the latter would use the money for his own purposes, and even in such a case his payment would make him liable to the principal, not at law, but only in equity for confederating with a delinquent trustee. The right to charge the undisclosed principal as a defendant was established in the last quarter of the eighteenth century.

¹ Roosevelt v. Doherty, 129 Mass. 301.

² See Hinson v. Berridge, summarized, *supra*, 454, n. 1.

³ 2 Stra. 1182.

Why, it may be asked, did the English and American courts sanction a doctrine, logically indefensible, and not recognized in other countries? No better answer has been found in the books than this statement of LORD LINDLEY: "The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not be known to the other party.

"At the same time, as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing, and with whom he did not, in fact, intend to contract. But middlemen, through whom contracts are made, are common and useful in business, and in the great mass of contracts it is a matter of indifference to either party whether there is an undisclosed principal or not. If he exists it is, to say the least, extremely convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude injustice."¹

LORD LINDLEY makes it clear that the English doctrine was the outcome of the feeling that it was just that the undisclosed principal should have the benefits and the burdens of the contract made in his behalf. But although he sees the anomalous character of the doctrine, it seems not to have occurred to him or to the judges who introduced it, that a more perfect justice might have been worked out without any sacrifice of the elementary principles of the law of contract. The failure to see how the desired justice could be brought about in any other way is the true explanation, it is believed, of the rule permitting the undisclosed principal to sue and be sued upon contracts made by his agent.

Let us see what measure of justice might have been attained, if actions by and against the undisclosed principal had not been allowed. Obviously there would have been the same relation be-

¹ *Keighley v. Durant* (1901), A. C. 240, 261.

tween the third person and the agent in the case of simple contracts, which now exists in the case of contracts under seal and of bills of exchange and promissory notes. As to claims against the third person, the agent and the agent only would be the obligee; as to claims in favor of the third person, the agent and the agent only would be the obligor.

To take up first claims in favor of the agent. The agent holds the legal title to the claim against the third person as he would hold the title to a covenant or note. But as he acquired it for the benefit of the undisclosed principal, he is trustee of it for the latter. The undisclosed principal as *cestui que trust* would realize indirectly through the trustee all that under the actual law he now obtains from him by a direct action against him. The third person would have the same defenses against the trustee suing for the principal, his *cestui que trust*, which he now has against the principal suing in his own name. The only difference would be this, that his defenses to an action by the agent suing as trustee would be legal defenses, whereas his defenses to an action by the principal in his own name are, strictly speaking, equitable defenses based upon estoppel. If the agent should become bankrupt before collecting the claim against the third person, the claim being held by him as trustee would not pass to his assignee in bankruptcy, but would continue to be held by him in trust for the principal, and if the claim should be paid to the assignee in bankruptcy, the latter would have to account for it in full to the principal. One case may be put in which the existing anomalous doctrine and the trust theory here suggested would lead to opposite results. Suppose A. has contracted to sell a tract of land to B., who was acting for C., an undisclosed principal, and that B., in violation of his duty to C., has sold his claim against A. to P., a purchaser for value without notice of C.'s interest therein. Under the rule which gives C. a direct right against A., P. must give way to the prior claim of C. But if C. is only *cestui que trust* of the claim held by B. against A., P. will prevail over C. in the numerous jurisdictions in this country in which the *bona fide* purchaser of a chose in action takes it free and clear of equities in favor of persons other than the obligor. The preference of the *bona fide* purchaser over the undisclosed principal, it is submitted, is more satisfactory than the opposite result.

But the real difficulty is not in giving the undisclosed principal the benefit of the third person's contract with the agent, but in imposing upon the principal the burden of the agent's contract with the third person. If we accept the sound view that the agent alone can be charged directly upon the contract with the third person, is it true, as the courts seem to have assumed, that there is no way by which the third person may indirectly hold the undisclosed principal responsible for the fulfillment of the agent's contract? No, the assumption of the judges is not well-founded. There is a mode of legal procedure, which, without any departure from legal principles, would give the third person whenever he needs and, in justice, is entitled to it, the power to compel the undisclosed principal to make good the contract of his agent. The relation of principal and agent carries with it without any express agreement, the obligation on the part of the principal not only to repay the agent for all legitimate disbursements, but also to save him harmless from all authorized undertakings made by him as agent. In other words, the principal is subject to two distinct duties, the duty of reimbursement and the duty of exoneration.¹ Accordingly, if the agent has entered into a contract with a third person for the purchase of the latter's land for \$10,000, although the agent, and the agent only, is chargeable on the promise to the seller to pay the purchase money, the undisclosed principal is also liable on his separate promise to the agent to pay, or to provide the funds with which the agent may pay, the seller. This right of the agent to exoneration by the principal is a thing of value, is property, a part of his assets. It is, therefore, like other property subject to execution at the suit of the third person who sold the land to the agent of the undisclosed principal. Choses in action, it is true, were not subject to common law execution until made so by comparatively modern legislation. But before such legislation they were accessible to creditors by equitable execution.² Even since such legislation, the right of exoneration can be reached only by equitable execution. For there is one important difference between a debtor's right of exoneration and his other

¹ "Le mandant doit indemniser entièrement le mandataire de la gestion de l'affaire, dont il a bien voulu se charger. Cette indemnité ne consiste pas seulement à rembourser le mandataire des déboursés qu'il a faits; il faut pour que l'indemnité soit entière qu'il soit déchargé des obligations qu'il a contractées pour l'exécution du mandat." Pothier, Mandat, § 80.

² Bayard v. Hofman, 4 Jonn. Ch. 450; Drake v. Rice, 130 Mass. 410.

choses in action. In general, when the claim upon a chose in action is satisfied, it is the obligee who receives the fruits of the claim, and when a debtor's chose in action against another is sold under execution, the execution purchaser receives these fruits, as successor to the execution debtor. But when a claim for exoneration is satisfied, the performance is not to the obligee but to a third person, the obligee profiting not by a positive addition to his resources, but by the extinguishment of a liability to the third person. This right is not the subject of a common law execution. By its nature it is not marketable, for the buyer would get nothing of value to him by its purchase. Such a right can be realized only by specific performance, and it is well settled that equity will compel specific performance of the obligation to exonerate.¹ Furthermore, it would be idle for the ordinary creditors of the one entitled to be exonerated from his liability to the third person to seek, by an equitable execution, to compel their debtor to realize this right of specific performance. The performance would not inure to their benefit, but to the advantage of the third person. But this third person, unlike the other creditors, is vitally interested in the exercise by his debtor of the latter's right of exoneration. He, therefore, is clearly entitled to maintain a bill for equitable execution to compel the debtor to realize his asset, that is, his right of exoneration.

The reasoning just suggested has been applied in giving a remedy against the trust estate to one who has furnished supplies to the trustee for the benefit of the estate. It goes without saying that the trustee alone is liable on the contract with the third person. But the trustee has the right to apply the trust property in exoneration of liabilities reasonably incurred by him in the administration of the trust. If he is unwilling to exercise this right, the creditor may treat the right as an asset of the trustee and, by a bill for equitable execution, compel the trustee to apply the trust property in payment of the liability.² But the trustee has not only the right to exonerate himself out of the trust property; he has also a right to be exonerated by the *cestui que trust* out of the general assets of the latter:³ that is to say, the duty of the *cestui que trust* to exonerate the trustee is just like the duty of the principal to exonerate the

¹ 1 Ames, Cases in Eq. Jurisd., 64, n. 1.

² Ames, Cases on Trusts, 2d ed., 423, n. 1.

³ *Hardoon v. Belilios*, (1901) A. C. 118.

agent. It seems clear that the courts which allow the creditor of the trustee to reach and apply the trustee's right of exoneration out of the trust property, could not consistently refuse to allow him to reach and apply the trustee's right of exoneration out of the general substance of the *cestui que trust*. *Clavering v. Westley*¹ is a case in point.

The right of equitable execution upon a debtor's right of exoneration is illustrated by another class of cases. If C. promises B. to pay B.'s debt to A., C.'s undertaking is similar to the obligation of the principal to exonerate the agent. If C.'s promise is under seal, A. is generally not allowed to sue C. at law even in jurisdictions which allow such an action upon a promise not under seal. But A. is allowed, nevertheless, to treat C.'s promise to pay B.'s debt as an asset of B.'s, and to enforce B.'s right of exoneration through a decree for its specific performance.²

It is evident from these illustrations, that, if the courts had seen their way to charge the undisclosed principal upon the theory of equitable execution against the agent's right of exoneration, they would not have been invoking a novel and untried equitable principle. It is now too late, of course, to apply this theory to simple contracts made by the agent of an undisclosed principal. But there seems to be no good reason why it should not be applied in cases where the agent contracts under seal or by bill or note, or as a shareholder of a corporation, or by one simple contract in behalf of several independent principals.³

It should be observed, however, that the working out of the right against the undisclosed principal through the agent's right of exoneration, will not always lead to the same practical results in the case of contracts under seal, that have been reached by the anomalous actual doctrine governing simple contracts.

If, for example, the principal has paid the agent in discharge of

¹ This case does not stand for the general principle to which LORD CRANWORTH objected in *Walter v. Northern Co.*, 5 D. M. & G. 629, 646.

² *Crowell v. Hospital*, 27 N. J. Eq. 650. See also Williston's *Wald's Pollock on Contracts*, 245.

³ The principle of equitable execution upon the debtor's right of exoneration is equally applicable to cases of disclosed agency, in which the agent only is directly liable on the contract with the third person, as when the contract is by instrument under seal, or by a negotiable instrument, or when, in the case of a simple contract, the third person and the agent agree that the latter, and not the principal, shall be liable on the contract.

his duty to him, that ends the agent's right to exoneration and, consequently, the third person's right to equitable execution. But in England the undisclosed principal presumably continues liable notwithstanding his payment to the ^{agent} principal unless the conduct of the third person led him to suppose that such payment would terminate his liability.¹

The right of exoneration might also be neutralized by the agent's misconduct after contracting with the third person. He might, for instance, misappropriate the goods he had bought on credit for the undisclosed principal. In such a case the third person would take nothing by his bill for equitable execution.² But under the existing anomalous rule the undisclosed principal would be liable on the agent's contract notwithstanding the agent's misconduct.

If, again, the agent's right of exoneration never arose, there could be, of course, no equitable execution for the third person. If, for example, an agent for an undisclosed principal made a contract in violation of his instructions, but a contract which would have been within the scope of his apparent authority, had the agency been disclosed, the third person could obtain no relief against the principal upon the theory of equitable execution. For the agent having disobeyed his instructions would have no right of exoneration against the principal. But in *Watteau v. Fenwick*,³ the undisclosed principal was charged upon the agent's contract in just such a case.⁴

In the three instances of simple contracts just considered, the third person, under the anomalous English and American rule, profits unjustly at the expense of the undisclosed principal. On the other hand, under that same rule, in at least one case of simple contract, the third person suffers unjustly to the undeserved advantage of the principal. This is true when the agent, acting for several principals, strangers to each other, instead of making separate contracts

¹ *Heald v. Kenworthy*, 10 Ex. 739; *Irvine v. Watson*, 5 Q. B. Div. 414, criticising the statements in *Armstrong v. Stokes*, L. R. 7 Q. B. 598. Probably the rule of America is the other way.

² Similarly, a creditor of a trustee seeking to charge the trust estates or the contingent trust will be defeated in whole or in part if the trustee is in arrears to the trust estate. *In re Johnson*, 15 Ch. D. 548; *Ames, Cases on Trusts*, 423, 2d ed., n. 1, par. 2.

³ (1893) 1 Q. B. 348.

⁴ See criticisms of this case in *Bechere v. Asher*, 23 Ont. App. 210, by Oslar, J. A.; in 9 L. Q. R. 111, by Sir Frederick Pollock; in *Ewart, Estoppel*, 246; and in 37 Sol. J. 280.

in behalf of each, makes a single lump contract in behalf of all. The principals cannot be sued jointly upon the contract, nor can any one of them be sued alone upon the entire contract. But by bills for equitable execution the third person could reach and apply, towards the satisfaction of his claim against the agent, the latter's separate rights of exoneration against the independent principals to the extent of each one's interest in the contract.

If the reasoning of this article is sound, the anomalous, but established English and American rule is open to these three objections. First, it violates fundamental principles of contract. Secondly, it gives the third person no relief against the principal upon the agent's contracts under seal, his negotiable contracts, or his liability as a shareholder, although, in point of justice, relief is demanded as much upon contracts in these forms as upon simple contracts. Thirdly, as a practical working rule in the case of simple contracts, it frequently operates unjustly, sometimes putting unmerited burdens upon the principal and sometimes denying the third person merited relief.

The doctrine of equitable execution upon the agent's right of exoneration, on the other hand, has these three merits. It accords with legal principle, it applies uniformly to all forms of contract, and produces just results.

JAMES BRADLEY THAYER.¹

It was my privilege to be a colleague of Professor Thayer throughout the twenty-eight years of his law professorship. Before his return to the Harvard Law School he had declined the offer of a professorship in the English Department of the College. Although his rare gift for thoughtful, graceful, and effective writing could not have failed to make him highly successful as a professor of English, his decision not to give up his chosen profession was doubtless a wise one. Certainly it was a fortunate one for the Law School and for the law.

During the early years of his service he lectured on a variety of legal topics, but Evidence and Constitutional Law were especially congenial to him, and in the end he devoted himself exclusively to these two subjects, in each of which he had prepared for the use of his classes an excellent collection of cases. Evidence was an admirable field for his powers of historical research and analytical judgment. He recognized that our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England. The results of his work appeared in his "Preliminary Treatise on the Law of Evidence," a worthy companion of the masterly "Origin of the Jury," by the distinguished German, Professor Brunner. His book gave him an immediate reputation not only in this country, but in England, as a legal historian and jurist of the first rank. An eminent English lawyer, in reviewing it, described it as "a book which goes to the root of the subject more thoroughly than any other text-book in existence."

Only a few days before his death Professor Thayer talked with me about his plans for the future, saying that he expected to complete his new book on Evidence in the summer of 1903, when he

¹ Prepared for the February meeting of the Colonial Society of Massachusetts, and printed in the Harvard Law Review for April, 1902. Reprinted by permission from the Harvard Law Review.

meant to relinquish that subject and devote the rest of his life to Constitutional Law, with a view to publication.

It is, indeed, a misfortune that these plans were not to be carried out. But although he has published no treatise upon Constitutional Law, he has achieved, by his essays, by his Collection of Cases, and by his teaching, a reputation in that subject hardly second to his rank in Evidence. To the few who knew of it, President McKinley's wish to make Professor Thayer a member of the present Philippines Commission seemed a natural and most fitting recognition of his eminence as a constitutional lawyer, and, if he had deemed it wise to accept the position offered to him, no one can doubt that the appointment would have commanded universal approval.

Wherever the Harvard Law School is known, he has been recognized for many years as one of its chief ornaments. When, in 1900, the Association of American Law Schools was formed, it was taken for granted by all the delegates that Professor Thayer was to be its first president. No one can measure his great influence upon the thousands of his pupils. While at the School they had a profound respect for his character and ability, and they realized that they were sitting at the feet of a master of his subject. In their after life his precept and example have been, and will continue to be, a constant stimulus to genuine, thorough, and finished work, and a constant safeguard against hasty generalization or dogmatic assertion. His quick sympathy, his unfailing readiness to assist the learner, out of the class-room as well as in it, and his attractive personality, gave him an exceptionally strong hold upon the affections of the young men. Their attitude towards him is well expressed in a letter that came to me this morning from a recent graduate of the School, who describes him as "one of the best known, best liked, and strongest of the Law Professors."

The relations of the law professors are probably closer than those of any other department of the University. No one who has not known, as his colleagues have known, the charm of his daily presence and conversation, and the delightful quality of his vacation letters can appreciate the deep and abiding sense of the irreparable loss they have suffered in the death of Professor Thayer.

In our great grief we find our chief comfort in the thought of his

simple and beautiful life, greatly blessed in his home and family, rich in choice friendships, crowned with the distinction that comes only to the possessor of great natural gifts nobly used, full of happiness to himself, and giving in abundant measure happiness and inspiration to others.

CHRISTOPHER COLUMBUS LANGDELL.¹

CHRISTOPHER COLUMBUS LANGDELL was one of the many sons of New Hampshire who won their distinction away from their native State. He was born in the small farming town of New Boston, May 22, 1826. William Langdell, his great-grandfather, came, in the first half of the eighteenth century, from England to Beverly, Massachusetts, and removed to New Boston in 1771, being one of the early settlers of that town. John Langdell, one of William's five sons, remained in Beverly, marrying, in 1789, Margaret Goldsmith; but after his death his widow, a vigorous and interesting personality, who lived to be a centenarian, made her home in New Boston, where her only son, John, the father of Christopher, spent his life. The great-grandfather, grandfather, and father were all farmers. His ancestry on the maternal side was Scotch-Irish. His great-grandfather, Andrew Beard, with his wife, Lydia Goardly, who excelled in the manufacture of linen cloth, and his four-year-old son Joseph, were in one of five shiploads of emigrants that came together to this country from the north of Ireland, in 1766. After living for a few years at Litchfield, he settled in New Boston. Joseph Beard's daughter, Lydia, became the wife of John Langdell, and the mother of Christopher.

It was from his mother's family that Langdell inherited his intellectual gifts. The Beards were generally good scholars, and many of them were teachers. His sister taught before her marriage and has been a book-lover all her life. His uncle, Jesse Beard, was a remarkably successful teacher. His great-uncle, William, was an officer in the Revolutionary War, who declined the pension to which he was entitled. His cousin, Alanson Beard, was a Republican leader in Massachusetts, and at one time collector of the port of Boston.

It was Langdell's very great misfortune to lose his mother when he was only seven years old. Three years later his home was

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broken up and thereafter Langdell lived in different families, working in the summer and going to the district school in the winter.

He was not precocious, but studious and ambitious, winning the confidence and approval of his teachers. One of them was wont, if called out of the school-room, to leave Christopher in charge of the pupils. It was probably this teacher who made him a present of a new Latin dictionary on the condition that no student was to know who gave it to him.

When he was sixteen, his sister Hannah, two years his senior, who had been for six years in Massachusetts, and whose constant wish was that "he might have a liberal education and become a distinguished man," made a visit to New Boston. "He came to see me there," she writes, "and there opened his heart to me for the first time, and it was also the first time he had made known his aspirations to any human being. He told me that he had a very strong desire for a college education, but did not see how it could be accomplished." His sister encouraged him to make a beginning and to believe that a way would be opened. She promised to help him so far as she could.

He taught his first school the following winter at Wilton, New Hampshire. In 1844 he worked for several months in one of the Manchester mills.¹

The venerable John Cross, of Manchester, who was then just starting in practice, recalls with pleasure an interview with Langdell, who called in the same year to ask if it were possible to realize his dream of going to college. The young lawyer encouraged him to try to work his way through Exeter, telling him that if he succeeded in this he could probably do the same at Cambridge. He acted on this advice, entering Exeter in the spring of 1845. He hoped to get upon the foundation, that is, to receive one of the scholarships awarded in July. But this hope was not gratified. His failure to win a scholarship, coming as it did after he had given a part of his hard-earned money to help his father, was probably the keenest disappointment of his life. Almost heart-broken, he

¹ Sixty years, it should be remembered, have made a great change in the quality of the mill-hand. Two generations ago many sons and daughters of farmers and others of moderate means spent a year or so in a mill before settling down to the work of life, or marrying. At Lowell, in 1850, those employed in the mills published a magazine called "The Lowell Offering." In this magazine first appeared several of the poems of Lucy Larcom, who with her sister was a mill-hand.

sat down upon the steps of the Academy building and burst into tears. But in spite of this blow he did not waver in his purpose. He remained at the Academy, being employed to ring the Academy bell, and in other work. His sister Hannah sent him occasionally small sums of money out of her earnings, saying to herself each time as she dropped the letter into the box, "This is the happiest day of my life." His younger sister, Mary, who died in 1850, at the age of seventeen, also made him small gifts. It is quite possible that, without the encouragement and touching devotion of his sisters, each of whom, like himself, worked for a time in a mill, he might not have realized his ambition for a college education. His abilities were discovered by the teachers, and the next July he won a scholarship which he held until he left Exeter in the summer of 1848. His rank rose each year. His "improvement" in the last year was marked "distinguished."

He was older than his schoolmates, and he had neither the time nor inclination to engage in their sports. But he had their thorough respect and liking. In 1847 he was elected president of the Golden Branch, the literary society of the Academy. To the end of his life he retained vivid recollections of his life at Exeter, and a strong interest in the place and the school. Being asked in later life what it was that he felt he owed to Exeter, he said: "I was a boy. I had lived on a farm and as a mill hand at Manchester. I went to Exeter — " and then after a pause added, with much feeling, "Exeter was to me the dawn of the intellectual life."

From Exeter he went to Harvard College, entering the class of 1851 as a fresh-sophomore. At the end of the year he ranked second in his class. His recitations made a strong impression upon his classmates, and it was the general opinion that, if he completed the course, he would lead the class. In September, 1849, the faculty assigned him a junior exhibition part, a Greek version, but afterwards excused him from performing it "on account of his delicate health." Early in December he, with twenty-five of his classmates, was granted leave of absence for the remainder of the term for the purpose of teaching school. Langdell did not return to college, partly for pecuniary reasons, and partly because he thought he was not getting enough out of his college life to make it worth while to delay longer the beginning of his legal training. After acting as a private tutor for a few months in Dover, he went back to Exeter

and studied law for eighteen months in the office of Messrs. Stickney and Tuck. He was still working his way. One of his Exeter contemporaries writes:

"One noon when we returned from the Academy, a young man was sawing wood in the back yard, and was at the same time reading a law book that lay upon a pile of wood before him. That was Langdell."

November 6, 1851, he entered the Harvard Law School. Although the course was then only a year and a half, he remained at the school for three years, being, during the greater part of the time, librarian as well as student. His exceptional ability was recognized alike by the professors and by his fellow-students.

He was engaged by Professor Parsons to assist him in the preparation of his work on Contracts, and contributed many of the most valuable notes in that widely-used book. His eyes were not strong, and the brightest men in the school were eager for the privilege of reading law to him for the sake of hearing his suggestions and comments upon the opinion of the judge or the statements of the writer. At commencement in 1854, when his college classmates, according to the practice of that day, received their degree of A.M., simply because they had lived three years after graduation, Langdell, although not a bachelor of arts, received the distinction of an A.M. *honoris causa*.

Judge Charles E. Phelps, of Baltimore, who was in the law school with him, gives this reminiscence of Langdell:

"He always wore a green-lined dark shade. Under his auspices there were a dozen of us who clubbed together. There I saw his 'case-system' in the making, although at the time I did not realize it. Over our sausage and buckwheat, or whatever it was, we talked shop, nothing but shop, discussed concrete cases, real or hypothetical, criticised or justified decisions, affirmed or reversed judgments. From these table-talks I got more stimulus, more inspiration, in fact, more law, than from the lectures of Judge Parker and Professor Parsons."

Judge Phelps alludes also to his "almost fanatical and somewhat contagious enthusiasm as a student," which is illustrated by a story of his contemporaries in the school, who found him one day in one of the alcoves of Dane Hall absorbed in a black-letter folio, doubtless a year-book. As he drew near, Langdell looked up and said, in

a tone of mingled exhilaration and regret, and with an emphatic gesture, "Oh, if only I could have lived in the time of the Plantagenets!" He roomed in Divinity Hall, but he was so constantly in the law library and so late at night, that some of the students used waggishly to say that he slept on the library table.

Certainly his three years at the law school were very happy years. He was realizing to the full the joy of the intellectual life. He had ample opportunity to seek the sources. Before long, as one of his friends writes, through his editorial work for Professor Parsons, the wolf was driven from his door never to return. The quality of his fellow law students was exceptionally high. Among them were James C. Carter, the three Choate brothers, Charles, William, and Joseph, James B. Thayer, George O. Shattuck, A. S. Hill, Alfred Russell, Arthur M. Machen, Addison Brown, and Charles E. Phelps. He saw much of Theodore Tabbets, who was in the Divinity School, and of Charles W. Eliot and John P. Allison, who were undergraduates. A strong friendship sprang up, in 1854, between him and the attractive William Gibbons, whose promising career was cut short by his untimely death the following year. In a letter to William his father, James G. Gibbons, says:

"I hope thee may be fortunate enough to secure Langdell's entire respect; but there's only one way to do it, I know, from the character of the man; and that is by conscientious devotion to duty. The acquaintance and confidence of one such person is worth that of fifty common men."

In December, 1854, Langdell left the law school and began practice in New York City, where he remained until 1870. For several years he was alone. His first important case, a Massachusetts case, turning upon the construction of a will, was given to him in the spring of 1856 by his Exeter and college friend Joseph G. Webster. He argued the case in November, 1858, and won it in August, 1859.¹ He spent much of his time in the library of the New York Law Institute. The librarian being asked one day by Charles O'Connor where to look for the law on a certain question, pointed to Langdell and said: "That young man knows more about the law on such a matter than anyone else." After this the young man assisted Mr. O'Connor in several important cases, notably in the celebrated Parish will case in 1857. In June, 1858, he wrote that he had been driven to

¹ Kuhn v. Webster, 12 Gray's Reports, 3.

death by another heavy will case for which he prepared a long written argument. Mr. O'Connor used frequently to say that Langdell was the best-read lawyer in New York, an opinion entertained by James C. Carter and other competent judges. In the summer of 1858 he formed a partnership with William Stanley, who was then practising by himself, his former partner, Edwards Pierrepont, having become a judge. The new partnership came about in this way. Mr. Stanley had occasion to consult Langdell at the Law Institute upon a very important case, and received from him so much valuable legal information that he made a proposition to him to become his partner. The proposition must have been a very good one, for Langdell wrote to a friend:

"My new business arrangement promises very finely in a pecuniary point of view. We have just as much business as we can do; though I suppose, we should do more, if we had it."

In November, 1860, Judge Pierrepont resigned his judgeship and became senior partner in the firm of Pierrepont, Stanley, and Langdell. This partnership was dissolved in 1864, and succeeded by the partnership of Stanley, Langdell, and Brown, the junior partner being Addison Brown, later United States District Judge. Langdell did not often appear in court, and, leading a secluded life, was not generally known even by lawyers; but by those with whom he came in contact he was recognized as an invaluable ally, and a very formidable antagonist in any controversy turning upon points of law. A narrow winding staircase led from the office of his firm to a room above, which was his private office, and adjoining it was his bedroom. In the almost inaccessible retirement of his office, and in the library of the Law Institute, he did the greater part of his work. He went little into company. He was a dear friend of the family of his partner, Stanley, and his friendship with William Gibbons gave him so cordial a welcome from his friend's father and mother and sisters, that he passed many evenings and Sundays with that hospitable, cultivated, and attractive family. At one time during his calls, the young ladies read Dickens aloud, and were surprised to find that when any place in or near London was mentioned, Langdell could tell them just where it was and all about it, although he had never been in England. This incident is a typical instance of the painstaking thoroughness with which he explored any subject that interested him, and of his vividly tenacious memory.

How he came to be Dane Professor, January 6, 1870, is best told in President Eliot's words:

"I remembered that when I was a junior in college, in the year 1851-1852, and used to go often in the early evening to the room of a friend who was in the Divinity School, I there heard a young man who was making the notes to 'Parsons on Contracts' talk about law. He was generally eating his supper at the time, standing in front of the fire and eating with a good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given me to understand that I was listening to a man of genius. In the year 1870 I recalled the remarkable quality of that young man's exposition, sought him in New York, and induced him to become Dane Professor."

The characteristic independence of the man and his determination to win only by sheer force of merit are indicated by his attitude during the interval between his interview with the President and his election by the Corporation and Overseers. He was so little known by the members of the governing boards that he was asked to give the names of some New York lawyers who were in a position to answer inquiries as to his qualifications for a law professor. He could not see his way to comply with their request. Pending the confirmation by the Overseers of his nomination by the Corporation, he was invited to meet a number of the Overseers at dinner. This invitation was also declined. He was unwilling to take a single step to influence his own election.

In September, 1870, he was appointed to the new office of dean of the law school, and held this position for twenty-five years. He continued his lectures as Dane professor for five years longer. He became professor emeritus in 1900, and up to the time of his death, July 6, 1906, devoted himself to writing.

September 22, 1880, he was married, at Coldwater, Michigan, to Margaret Ellen Huson, who survived him. He left no children.

Langdell was a successful practitioner in New York; but his fame rests wholly on his threefold work in Cambridge, as a writer, as the reorganizer and administrator of the law school, and as the originator as well as exponent of a new method of legal education.

The successful assistant of Professor Parsons might have been expected to produce early in his professional career a treatise wholly his own. But Langdell seems not to have had the ambition for legal

authorship by itself. His collection, "Select Cases on Contracts," appeared in instalments during the academic year 1870-1871, the completed volume being published in October, 1871, with a short summary of thirteen pages, an admirable specimen of terse and accurate generalization. The following May he published his "Select Cases on Sales of Personal Property," with a summary of twenty pages described by Judge Holmes as "unpretentious but masterly." In 1873 he began to print in instalments his "Cases on Equity Pleading," and two years later completed the book together with a summary of one hundred and twenty pages. In 1877 this summary was issued separately. In his second edition of "Cases on Contracts," published in 1879, the summary was nearly as long as the summary of Equity Pleading, and a year later was issued as a separate book, a second edition of which was published in 1883.

In 1879 he began to teach the subject of equity jurisdiction and, accordingly, during that year printed the first three parts of his "Cases on Equity Jurisdiction," to which he added two parts in 1883. He never made a summary of this incomplete collection, and abandoned its use in 1890. He preferred to give his attention to other branches of equity jurisdiction, basing his teaching, however, not upon a printed collection of cases, but upon a mere list of cases.

During the last twenty years of his life he wrote for the *Harvard Law Review* a considerable number of articles upon various heads of equity jurisdiction, but with no thought of making a book upon that subject. By his sufferance rather than with his encouragement, the *Harvard Law Review*, in 1905, published these essays in a volume, "A Brief Survey of Equity Jurisdiction."¹

¹ After the publication of this volume, five additional articles upon *Equitable Conversion* appeared in *Harvard Law Review*, Vol. XVIII. 1, 83, 245, and *Ibid.*, Vol. XIX. 1, 79, 233, 321. These articles, together with an index and a table of cases cited, are included in a new edition of the book.

Besides the "Brief Survey" Langdell wrote for the same *Review* the following articles: *Discovery under Judicature Acts of 1873, 1875 (1878-1898)*, *Harvard Law Review*, Vol. XI. 137, 205, *Ibid.*, Vol. XII. 151; in the nature of a supplement to his *Summary of Equity Pleading*. *Mutual Promises as a Consideration for Each Other (1901)*, *Ibid.* Vol. XIV. 496; a defense of a doctrine set forth in his *Summary of Contracts*. *Patent Rights and Copyrights (1899)*, *Ibid.*, Vol. XII. 533; a short extract from a lecture to his class. *The Status of Our New Territories (1899)*, *Ibid.*, Vol. XII. 365. *The Northern Securities Case and the Sherman Anti-Trust Act (1903)*, *Ibid.*, Vol. XVI. 553. *The Northern Securities Case under a New Aspect (1903)*, *Ibid.*, Vol. XVII. 41. *Dominant Opinions in England during the Nineteenth*

From this account of his writings it is plain that nothing was farther from Langdell's mind than the production of a *magnum opus*. His three treatises were in a measure forced from him as the natural outcome of the class-room discussions of his collection of cases. In the preface to the second edition of his "Cases on Contracts," he said of the summary at the end of the volume:

"The object of it has been to develop fully all the important principles involved in the cases, and to that object its scope has been strictly limited."

The same was true of his Summary of Sales, and, to a large extent, also of his Treatise upon Equity Pleading and his Brief Survey of Equity Jurisdiction. His Cases on Contracts and Sales, and his course upon Equity Jurisdiction being fragmentary,¹ his treatises upon those subjects are also fragmentary. But each of them is a solid contribution to the law.

In his analysis of contracts he emphasized the distinction between unilateral and bilateral contracts, and these terms, which, essential as they are to correct legal thinking, were hardly to be found in any of our law books a generation ago, are now thoroughly domiciled in our legal terminology. There was another distinct advance in the law of contracts when he made detriment, incurred by the promisee at the request of the promisor, the universal test of a consideration. Sir Frederick Pollock in an appreciative review of the "Brief Survey," refers to the distinction established by the author between bills for an account proper and bills based upon an "Equitable Assumpsit" as "a brilliant example of Professor Langdell's method." Hardly less brilliant is his statement that the so-called doctrine of specific performance of contracts is a misnomer in the case of affirmative contracts, since equity in such cases enforces not the specific performance of the contract, but specific reparation for its breach. No one who wishes to wrestle with the

Century in Relation to Legislation, as Illustrated by English Legislation, or the Absence of it, during that Period (1906), *Ibid.*, Vol. XIX. 151.

¹ Langdell certainly intended at one time to complete his collection of Cases on Contracts, and probably expected to add another volume to the Cases on Sales. But the teaching of other objects monopolized his time, and he willingly relinquished these subjects to his pupil and colleague, Professor Williston. One cannot but regret that the pioneer "Case Books" should be permanently shelved, but the life of a case-book is necessarily short. Moreover, much of Langdell's work still lives in Williston's "Cases on Contracts" and "Cases on Sales."

fundamental conceptions of law can afford to overlook Langdell's Classification of Rights and Wrongs, or fail to profit greatly by his substitution of the terms absolute and relative rights for rights *in rem* and rights *in personam*.

To a legal expert the summary of Equity Pleading, the only one of his treatises that covers its subject, is the best exhibition of the author's great powers of historic insight, acute analysis, original, sagacious generalization, and vigorous, terse expression. His derivation of the system of equity pleading from the ecclesiastical system, with borrowings from the common law practice, is as convincing as it is fascinating, and, read in connection with the English cases upon equity pleading, demonstrates the practical importance of a knowledge of legal history by those who are administering the law. Had the English equity judges of the seventeenth and eighteenth centuries been familiar with the historical development of equity pleading, as described by Langdell, suitors would have been saved from a mass of costly litigation, and the reports would not have been encumbered with what must be considered the least creditable judgments in the history of English equity. The part of this classical treatise which is likely to have the most far-reaching influence is the chapter dealing with the nature of equity jurisdiction. It is an ancient maxim that equity acts *in personam*. But to Langdell belongs the credit of emphasizing, as no other writer has emphasized, the importance of this maxim, and of asserting that the power of the chancellor, as representative of the sovereign, to compel the defendant to do what he ought to do and to refrain from doing what he ought not to do, is the key to the whole system of equity. This conception has dominated all his writing and teaching of equity.

His essays upon "The Status of Our New Territories" and upon the Northern Securities Case indicate his active interest in, and his ability to deal with, the legal aspects of large public questions. The general reader will find an admirable illustration of the quality of his mind in his review of Dicey's "Law and Public Opinion," a review all the more remarkable when it is remembered that the reviewer was in his eightieth year.

Langdell's chief ambition and his greatest achievement was the reorganization and development of the Harvard Law School. He wished to see it a great school in a great university. He believed

that this wish might be gratified because of his conviction, formed in his student days, that law is a science and that all the available materials of that science are contained in printed books. These two principles explain the chief changes in the school introduced during his administration. He sought to improve the quality of the students, to increase the amount of their work, and to enlarge their opportunities. He found at Cambridge a school without examination for admission or for the degree, a faculty of three professors giving but ten lectures a week to one hundred and fifteen students of whom fifty-three per cent had no college degree, a curriculum without any rational sequence of subjects, and an inadequate and decaying library. He lived to see a faculty of ten professors, eight of them his former pupils, giving more than fifty lectures a week to over seven hundred and fifty students, all but nine being college graduates, and conferring the degree after three years' residence and the passing of three annual examinations. At the beginning of his professorship the treasurer's books disclosed a deficit. At the time of his death the surplus was nearly half a million dollars, large enough to provide a library fund of \$100,000, and an additional building with ampler accommodations than those of Austin Hall, to be named, with peculiar fitness, Langdell Hall. Of the 99,000 volumes now in the library, 90,000 have been added since 1870, and the collection, if regard be had to the number, editions, and physical condition of the books, is believed to be without a rival. Truly his high ambition for the school was abundantly gratified. It is no disparagement to his great services, and it is right to add, that his wonderful success would have been impossible without the sympathetic and unswerving support of President Eliot.

A novel departure of the new administration was the appointment to the teaching staff of a young graduate of the school who had had no office experience. Long afterwards, in 1886, in an address at the dinner of the Harvard Law School Association, Langdell gave his reasons for recommending so striking a novelty:

"I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes,

— not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman prætor, still less of the Roman procurator, but the experience of the jurisconsult."

In the Harvard Law School the exception has become the rule. A majority of the professors now in its faculty were appointed soon after receiving their degree in law. The precedent introduced by Langdell has been followed in so many law schools that he may be said to have created a new and attractive career for able young lawyers with a taste for the academic life.

But the most startling and most fruitful of the changes introduced by Langdell was the innovation in the mode of teaching and studying law. The lawyer bases his brief, and the judge his opinion, not upon treatises but upon a careful study of the reports of decided cases. Langdell maintained that the law student should pursue this same method; and that collections of cases upon the different branches of the law, arranged systematically and in such order as to exhibit the growth and development of legal doctrines, should be analyzed and discussed by pupil and teacher in the class-room. He wrote in the preface to his "Cases on Contracts":

"Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only, way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential

doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources."

This searching of the original sources is so scientific and so rational a procedure that it is difficult to explain the hostility with which this innovation was received. Hardly one of the Boston lawyers had any faith in it. After the first lecture at the school, with Langdell's "Cases on Contracts" as the basis of discussion, the attendance dwindled to a handful of students who were stigmatized as Langdell's freshmen. These freshmen were among the best men of the school and their enthusiastic faith gradually converted others. But for several years the students were divided into Langdellians and anti-Langdellians, and after the disappearance of the latter, several years elapsed before Langdell's method was adopted by all his colleagues. To-day the Langdell method is adopted in whole or in part in a majority of the schools of the country, and in nearly all the best schools. After explaining his theory of legal education in the preface of his "Cases on Contracts," Langdell never wrote a word in its behalf. His triumph was won solely by the influence of his teaching upon his pupils and by the impression made by them in the practice of their profession. His influence, already dominant, promises to be enduring.

In the class-room what most impressed his pupils was his single-minded desire to get at the root of the matter. To this end, in the earlier years of his teaching, he welcomed their suggestions and criticisms, and they, knowing that their views would be received and measured by the same tests by which he wished his own views to stand or fall, entered into the discussion with the keenest enthusiasm. In the seventies the curriculum was very meagre as compared with the courses offered in the next two decades, but in one respect Langdell's pupils in the days when his innovations were on trial enjoyed an advantage denied to those who came to the school after the battle had been won. The master as a pioneer was blazing a new path, and his disciples felt that they too were carrying an axe and were in some measure responsible for the master's success. The intellectual stimulus due to this feeling and to the delightful relations between him and his followers, was so great that many of them, and the present writer is proud to count himself as one of them, recognize with gratitude that he did more for their intellectual

development than any other man. Professor Beale, a pupil and colleague, says of his later teaching days:

"When we entered his lecture-room we were struck by the massive intelligence of his brow, we admired his severe and almost impassive face, and we seemed to find the quiet intellectual atmosphere of the cloister. In our time, as a result of his failing sight, he never used the Socratic method in his teaching. He simply talked, slowly and quietly, stating, explaining, enforcing and reinforcing the principles which he found in the case under discussion. Our note-books read like his articles on Equity Jurisdiction: quiet, forceful, full of thought and requiring close study to follow them. His manner was usually as quiet as his words. Only now and then, when some subtle point was raised by Judge Mack or Professor Williston (not then judge or professor), his face would light up, and he would think aloud, to the vast delight of those members of his class who could follow him. Those were halcyon days. And once in a great while something would amuse him, and then he would throw back his head with a laugh that seemed to have the full strength of his mind in it."

While it was a liberal education to follow the working of his mind in the class-room, close attention and hard thinking were demanded of those who would keep up with his compact reasoning. His teaching was pre-eminently fitted for the cleverest men in the school. For this reason, especially in his later years, his classes were not large.

The influence of the law professor is rarely traceable into concrete results. But two statements of Langdell may be traced from the professor's chair, through his pupils, to the reported judgments of the court. When teaching Bills and Notes he described defenses which, following the *res*, were good against every holder, as real defenses, in contradistinction to personal defenses, which were good only against a particular person or some one in privity with him. This distinction was repeated by one of his pupils in a publication and afterwards mentioned with approval by the Supreme Court of Massachusetts.¹ On another occasion Langdell said that a negotiable bill or note became, after maturity, a mere chose in action.

¹ Watson v. Wyman, 161 Mass. 96, 99-100. "Subject only to a personal defense, as it is happily called by Mr. Ames, 2 Ames, Bills and Notes, 811." Mr. Ames is glad of this opportunity to place the credit of this distinction where it truly belongs.

This remark was repeated by one of his pupils who had become a professor; a pupil of the latter used it in a brief and the court in giving its opinion adopted the statement of the successful counsel.¹

Langdell was by nature a conservative. This may seem a rash statement to make of so great an innovator in legal education, and of so independent and original a writer and teacher. But the statement is true. Hewas conservative, but hisconservatismyielded to his irresistible passion for the truth. After a patient and thorough investigation of a subject, he frequently reached conclusions at which he would have looked askance at the outset. He never had occasion to make a careful study of the subject of Quasi-Contracts. He never became quite reconciled to the introduction of this new term into our law, and he could hardly restrain his impatience if one spoke to him of the doctrine of unjust enrichment. Had he explored this subject in his exhaustive manner, it is quite certain that he would have adopted and made constant use of these terms. His passion for truth explains another seeming contradiction in his nature. He was extremely modest, but extremely tenacious of his convictions. This not from any pride of opinion, but because any one who would change his convictions, formed after painstaking examination and much reflection, must plough deeper than he had gone, and, by a wider generalization, expose the error of those convictions. Once convinced of error, no one was readier to admit it. If Langdell ever swerved from his determination to see things as they are, it was unconsciously and because of the defect of another splendid quality, his extreme loyalty to his friends, which in him was almost feminine in its intensity.

Langdell had the gift of a cheerful nature. In the days of his poverty, one of his early friends writes, "he struggled with a smiling face." The same cheerful spirit sustained him in his later years, when failing eyesight debarred him from many pleasures and hampered him greatly in his investigations.

He cared little for general society, but was an excellent talker. His hearty laugh was as delightful in conversation as it was in the class-room. One always carried away from a talk with him some fruitful suggestion with renewed respect for the man as a deep and original thinker.

A career so rich in great achievements as Langdell's could not fail

¹ *Hinckley v. Union Pacific Co.*, 129 Mass. 52, 61.

of ultimate recognition. Happily, in his case, the recognition came in his lifetime. Besides the honorary degree of Doctor of Laws, conferred upon him in 1875, he received from his university three honors, no one of which had been bestowed upon any other Harvard professor. When he became professor emeritus in 1900, his full salary was assured to him for life. In 1903 his name was given to one of the law professorships, and the handsome new law building bears the name, Langdell Hall. His fame is growing as his ideas are making new converts. The sister, who cheered and helped the farmer's boy in his time of need, has the rich reward of knowing that her brother is likely to be regarded for generations as the greatest of American law professors.

**TABLE OF CASES.—TABLE OF OTHER
AUTHORITIES CITED.—INDEX.**

TABLE OF CASES.

Abbot Westminster v. Certain Men	224	Altoona Co. v. R. R. Co.	202
Abbott v. Abbott	229	Ambrose v. Roe	95
— v. Doane	328, 341	American Co. v. Fancher	414
— v. Johnson	307	Ammonette v. Black	429
Abdee's Case	105	Anchor Co., Re	301
Abel v. Alexander	350	Anderson v. Anderson	432
— v. Hutto	200	— v. Hapler	179
Ablain's Case	168	— v. Holmes	303
Adams v. Broughton	209	— v. Whitehead	301
— v. Perry	287	Andrew v. Aitken	383
— v. Power	307	— v. Berry	107
— v. Wylie	109	— v. Boughey	111, 349
— <i>Ex parte</i>	165	Andrews v. Broughton	427
Adler v. Parr	403	— v. Eaton	107
Adnam v. Cole	293	Ani Waata v. Grice	206
Adye v. Smith	288	Anon. v. Arrington	259
Agars v. Lisle	86	Anonymous Cases, see Table of Other Authorities.	
Agency Co. v. Short	206	Anthes v. Schroeder	401
Ahrens v. Jones	430, 431	Anthony v. Fritts	112
Aiken v. Short	277	Appilgarth v. Sergeantson 144, 234, 235	
Alaska Assn. v. Domenico	337	Applethwaite v. Northby	93
Alcorn v. Westbrook	134	Appleton Bank v. McGilvray	271
Alexander v. Burnet	202, 204	Arbuckle v. Kirkpatrick	424
— v. Cresheld	125	Archbishop of York v. Bishop of Ely	41
— v. Gibbon	203	Arend v. Smith	328
— v. Schreiber	101, 391	Armsby v. Farnam	303
Alford v. Eglsfield	95	Armstrong v. Jowell	296
Allen v. Booker	426	— v. Lisle	43, 54
— v. Cerro Gordo Co.	375	— v. Risteau	200
— v. Culver	101	— v. Simonton	189
— v. Flood	399, 404, 407, 408	— v. Stokes	453, 462
— v. Harris	159, 349	Armyn v. Appletoft	35
— v. Knight	267	Arnold v. Cheque Bank	276
— v. Mansfield	199	Arnot v. Bingham	422
— v. Rivington	206	Arrington v. Liscom	200
— v. Sharpe	275	Arris v. Stukely	120, 164
— v. Thayer	230	Arundel v. Gardiner	324
— v. Turck	328	Arundell v. Berkeley	237, 238
Allen's Case	214	Ash v. Gallen	247
Alley v. Hopkins	350	Ashbee v. Pidduck	112
Allison v. Abendroth	351	Ashbrooke v. Snape	146
Alston v. Pamphyn	232	Ashby v. Wilson	387
Alton v. First Bank	278		

Bassett v. Bassett	427	Bignold v. Bignold	106
—— v. Nosworthy	265	Bilborough v. Holmes	300, 301
—— v. Salisbury Co.	403	Billon v. Hyde	120
Bassford v. Pearson	427	Bircher v. Walther	423
Bateman v. Allen	177, 206	Bird v. Gammon	300, 301, 346
Bates v. Hinton	109	—— v. Lisbros	199
—— v. Johnson	268	Birdsall v. Davenport	216
Batthyany v. Walford	161	Birdsell v. Shaliol	209
Baxter v. Chapman	276	Bishop v. Busse	337
—— v. Read	95, 143	—— v. Church	99
Bayard v. Hofman	459	—— v. Eagle	118
Bayley v. Homan	349, 350	—— v. Mahoney	422, 424
Baylis v. Hughes	88	—— v. Montague	85, 183, 184
Baylye v. Hughes	102	Bitzer v. Bobo	413, 414
Bazemore v. Davis	413	Bize v. Dickason	120
—— v. Freeman	114	Black v. De Camp	309
Beadle v. Hunter	204	Blackburn v. Morton	202
Beals v. Neddo	114	Blackett v. Bates	372
Beam v. Copeland	284	Blackwell v. Redman	107
Beaver v. Fulp	328, 334	Blackwood v. Gregg	315
—— v. Barlow	307	Bladwell v. Stiglin	88
Bechere v. Asher	462	Blair v. Hill	420
Beckingham v. Vaughan	119	—— v. Snover	303
Bedell v. Tracy	426	Blake v. Metzgar	416
Beedle v. Norris	134	Blake's Case	111
Beeston v. Langford	249	Blanchard v. Blanchard	316
Behring v. Somerville	278	—— v. Taylor	177
Belden v. Davies	107	Blattmacher v. Saal	344
Bellamy v. Debenham	376	Bloome v. Wilson	90
Bellefontaine Co. v. Niedringhaus	201	Bloss v. Holman	59
Bellingham v. Dibble	201	Blount v. Mitchell	186, 217
Benden v. Manning	130	Blundell's Case	301
Bendix v. Ayers	351	Board v. Board	177
Benjamin v. Bank	186	—— v. Wilkinson	422, 423
Benson v. Phipps	351	Bobbett v. Pinkett	281, 418
Bentley v. Vilmont	55	Bohannon v. Chapman	190, 204
Benwell v. Innes	388	Bohle v. Hasselbroch	413, 414
Beresford v. Goodrouse	91	Bonesteel v. Bonesteel	310, 416
—— v. Woodroff	93	Bonnel v. Fowke	163
Bernard v. Tamworth	234, 235	Booker v. Wolf	426
Bernheimer v. Marshall	270, 273, 275	Boone v. Eyre	352
Bernstein v. Humes	175	Boone Bank v. Latimer	421
Berry v. Berry	345	Booth v. Starr	100
—— v. Heard	229	—— v. Turle	427
Besshear v. Rowe	301	Boots v. Ferguson	207
Best v. Yates	130	Bordeau v. Greene	403
Bestwick v. Camden	232	Boreham v. Craig	428
Beswick v. Cunden	232	Borel v. Mead	378
Betsey v. Torrance	216	Bosden v. Thinne	155
Bettisworth v. Campion	343	Boson v. Sanford	165, 443
Bevan v. Citizens Bank	421	Boston Co. v. Richardson	281, 393, 397
Bible Society v. Pendleton	286	Botkin v. Livingston	325
Biddle v. Wellon	200	Bourne v. Cabot	303
Bidwell v. Catton	92	Bovey v. Castleman	92
Bief v. Dier	234	Bowen v. Hall	262
Bigelow v. Jones	178, 230	—— v. Kurtz	347

Burnham v. Barth	422, 424	Case v. Shepherd	230
Burns v. Grand Lodge	301	Caston v. Caston	203
— v. Lawrie's Trustees	257	Caswell v. Fellows	302
Burroughs v. State Co.	303	Cator v. Burke	259
Burrows v. Alter	107	Catt v. Tourle	377
— v. Johntz	423	Catteris v. Cowper	227
Bursen v. Martin	64	Cattley v. Loundes	415
Burt v. Bowles	427	Cave v. Cave	254
Bush v. Bradley	229	— v. Mackenzie	264
— v. Bush	208	Cavendish v. Froth	110
— v. Rawlins	336	— v. Middleton	163
Butcher v. Andrews	94	Cavin, <i>Re</i>	424
— v. Porter	69	Chadbourne v. Swan	203
— v. Steuart	301	Chadwick v. Chadwick	372
Butler v. N. Y. Co.	216	— v. Sprite	256, 258
Butterfield v. Hartshorn	305	Chamberlain v. Cooke	134
Byngeley v. Grymesby	237, 238	— v. Stearns	288
Byrne v. McGrath	413	—, <i>Ex parte</i>	70
Cade v. Davis	426	Chamberlin v. Robertson	377
Calder v. Moran	428, 430	Chambers v. Miller	278
Caldwell v. Walters	230	Champion v. White	107
Call v. Ellis	202	Champlain Co. v. O'Brien	328
Callisher v. Bischoffsheim	326	Chandelor v. Lopus	137, 438
Calloway v. Bird	70	Chandler v. Chandler	304
Calthrop v. Allen	88	— v. Walker	229
Cammerer v. Muller	344	Chapin v. Freeland	201, 202
Campbell v. Arnold	228	Chapman v. Allen	158
— v. Brown	430	— v. Chapman	432
— v. Drake	414	— v. Southwick	169
— v. Holt	199, 200, 202	Charnock v. Charnock	105
— v. Point St. Works	177	Chase v. Westmore	158
Candler v. Lunsford	205	— v. Weston	101, 391
Cannon v. Alsbury	344	Chatfield v. Wilson	403
— v. Apperson	293	Chawner v. Bowes	98, 148, 152
— v. Smalwood	37	Cheatham v. Young	201
Cantrel v. Church	232	Chelmewyke v. Hay	237
Capital Bank v. Coldwater Bank	423	Chesley v. King	403, 406
— v. Henty	402	Chichester v. Cobb	328
Caplen's Estate	304	Chiles v. Jones	200
Cargile v. Harrison	202	Chilhowie v. Gardiner	375
Carington v. Humphrey	249	Chinn v. Russell	66
Carley v. Graves	423	Chinnery v. Vial	59
Carlisle Co. v. Thompson	268	Chipley v. Atkinson	406
Carpenter v. Hale	186, 215	Chisholm v. Marshalleck	206
— v. Murphee	301	Cholmondeley v. Clinton	198
— v. Northborough Bank	275	Choppin v. Gobbold	302
— v. Soule	334	Chouquette v. Barada	204
Carpenter's Estate	313	Christy v. Alford	177, 203
Carrington v. Carson	156	Chute v. Parke	350
Carritt v. Real Co.	265	City v. White	200
Carter v. Carter	267	City Bank v. Blackmore	423
— v. Williams	385	— v. Burns	274, 278
Cartland v. Morrison	186, 217	— v. Nat. Bank	270, 280
Carver v. Todd	430	City of London v. Gover	161
Case v. De Goes	230	Clapp v. Wilder	386
		Claridge v. South Staffordshire Co.	59

Cover v. Stem	195	Daubeny v. Cockburn	264
Covert v. Pittsburg Co.	204	Davenport v. Congregational So-	
Cowell v. Edwards	156, 166	ciety	328
— v. Simpson	158	— v. Plow Co.	423
Cowles v. Hall	205	Davey v. Prendergrass	112
Cowlin v. Cook	348	Davies v. Otty	427
Cowper v. Green	325	— v. Watson	278
Cox v. Bateman	412	Davis v. Clancy	228
— v. Cox	200	— v. Hardy	302
Coyner v. Lynde	337	— v. Herndon	186, 217
Crabtree v. Edwards	202	— v. McArthur	205
Craig v. Sibbett	276	— v. Mills	198, 201
Crawford v. Jones	413, 414	— v. Minor	202
Craythorne v. Swinburne	166	— v. Stout	336
Crispen v. Hannavan	203	— v. Strathmore	317
Crocker v. Whitney	303	Davison v. Gent	206
Cromwell v. Norton	427	Davock v. Nealon	200, 203
Crosby v. Wood	325	Daw v. Newborough	244, 247
Cross v. Andrews	110, 134	Dawkes v. Coveneigh	46
Crosse v. Bilson	69	Day v. Austin	60
— v. Gardner	138	— v. Bisbitch	184
Crossman v. Keister	431	— v. Gardner	328
— v. Wohlleben	350	— v. Roth	413
Crowell v. Druley	200	— v. Wilder	203
— v. Hospital	461	Dayton v. Claffin Co.	413
Crowhurst v. Laverack	327	Dean v. Stevens	294
Crowther v. Farrer	350	Dearle v. Hall	265
Culliar v. Jermin	347	De Bernales v. Fuller	119
Cumber v. Wane	332	Decker v. Shaffer	302
Cunningham v. Patton	203, 206	Dedham Bank v. Everett Bank	275
— v. Wood	414	Dee v. Bacon	86
Curren v. Mayor	284	Deem v. Milliken	313
Currier v. Gale	177, 203	Deering v. Carrington	213
— v. Hodgdon	303	— v. Moore	351
— v. Studley	202	DeGray v. Monmouth Co.	386, 389
Curtis v. Brown	302	DeGroot v. Derby	303
— v. Daniel	202	De la Rochefoucauld v. Bonstead	427
Cuthbertson v. Irving	102	De Laureheel v. De Boom	430
Cutter v. Baker	302	Delz v. Winfree	408
Cutting v. Cox	230	DeMott v. Hagerman	179
Cutts v. Spring	227	Den v. Demarest	176
Cuxon v. Chadley	302	Denlar v. Hile	375
		Denny v. Parnell	89
Dahill v. Booker	217	Denver Co. v. Smeeton	303
Daie v. Hampden	156	Deputy v. Stapleford	114
Dale v. Hall	159	Detwiler v. Hartman	293
— v. Roosevelt	107	Deven v. Atkins	307
— v. Sollet	117	Dever v. Hagerty	216
Damport v. Simpson	401	Dewbery v. Chapman	164
Dana v. Wentworth	391	Dewey v. Osborn	230
Dand v. Sexton	60	De Witt v. Hays	310
Daniel v. Holland	207	Dickerson v. Kirk	200
Danvers Bank v. Salem Bank	270, 274	— v. Mays	427
Dapsens v. Lambert	405	— v. Tillinghast	268
Dare v. Hall	336	Dickinson v. Goodspeed	229
Dartnal v. Morgan	168	Dickson v. Swansea Co.	112

TABLE OF CASES.

493

Epperson v. Stansill	203	Fightmaster v. Beasley	189
Equitable Co. v. Brennan	387	Final v. Backus	216
Erck v. Church	205	Finan v. Babcock	305
Erdman v. Corse	200	Finch v. Shaw	266
Erickson v	187, 217		245
	65		296
	254		281
	300	— v. Burnham	276
	266	— v. Devenish	278
	303	— v. Hummel	423
	280	— v. Ricker	270, 274
	146		95
	35	—, <i>Re</i>	293, 294
<i>Re</i>	259	Fitch v. Sutton	332, 333
Evangel. Synod v. Schoeneich	423		293
Evans v. Davis	385		109
— v. Evans	229		205
— v. Yeoman	135		403
Evans's Estate	304		388
Everard v. Hopkins	131		156
Ewell v. Clay	423	—, <i>Re</i>	294
— v. Tidwell	202	Fletcher v. Harcot	324
Exon v. Partridge	156, 166		282, 418
Eyre v. Burmester	354, 261		234
			372, 374
Fable v. Brown	295	— v. Crasden	331
	113, 114	— v. Gush	348
	302, 305	Floyd v. Brown	209
Falhers v. Corbret	169	Foakes v. Beer	335
Falmouth v. Penrose	89	Fooley v. Preston	135
Faloon v. Simshauser	200	Foord v. Hoskins	246
	301	Forbell v. New York	403
	205	Ford v. Adams	303
Fansler v. Jones	413	— v. Garner	328, 350
Farendon v. Kelsey	234, 235	— v. Peoples Bank	270
Faritus v. Gamel	37, 224	— v. Stobridge	156
— v. de Sackville	224	Foreman v. Neilson	208
— v. Men of Stanton	224	— v. Wolf	200
Farnum v. Peterson	216		402
— v. Virgin	302		386, 389
Farrar v. Bank of N. Y.	112		376
Farwell v. Homan	414	Bank v. Carter	277, 279
Fawcett v. Freshwater	351	Fosdick v. Hempstead	287
—, <i>Re</i>	384, 389	Foshay v. Ferguson	402
Fears v. Sykes	202	Foster v. Eltonhead	249
Feilden v. Slober	385	— v. Paine	301, 308
Felubrigge v. Damme	237	— v. Scarlett	143
Fennelly v. Anderson	377	Fouty v. Fouty	428
Ferchen v. Arndt	424	Fowler v. Brooks	351
Feret v. Hill	314	— v. Garlike	288
Ferry v. Stephens	334	— v. Iwardby	147
Festerman v. Parker	338	Fox v. Hubbard	317
Festorazzi v. St. Joseph's Church	294	— v. Northern Liberties	208, 209
Field v. Apple River Co.	227	Foy v. Cochran	186, 216
— v. Jellicus	70	Fraker v. Brazleton	376
— v. Snell	101	Franchot v. Leach	107

Gott v. Nairne	293	Haaven v. Hoas	432
Gould v. Cayuga Bank	310	Hackett v. Marmet Co.	200
Gowdy v. Gordon	428		270
Gower v. Capper	344		293, 294
Graeven v. Dives	205		427
Graff, Re	420		118
Graham v. Burch	316	Hal v. Linn	430
— v. Houston	230	Halcot v. Marchant	412
— v. McCampbell	381	Hale v. Flockton	349
— v. Peate	227	— v. Forbes	350
— v. St. Charles Co.	406	— v. Munn	178
Grandin v. Grandin	326	Hall v. Davis	227
Granham v. Skipper	267	— v. Ewin	383, 385
Grant v. Duluth Co.	328	— v. Potter	107
— v. Grant	426	— v. Robinson	186
— v. Smith	216	— v. Webb	200
Graves v. Pinchback	413, 415	Hallas v. Robinson	256
Gray v. Barton	334		412, 414, 419, 420
— v. Handkinson	107, 109		107
— v. Hill	165	Halst v. Frances	302
— v. Jones	266	Ham v. Goodrich	426
Greathouse v. Dunlap	107	Hamilton v. Windolf	401
Greaves v. Tosfield	317		216
Green v. Harrington	167		259
— v. Haskell	413, 414	— v. Ward	120
— v. Jones	391	Hamond v. Barker	113
— v. Kelly	328, 341	Hanks v. Barron	328
— v. Langdon	334	Hanna v. Renfro	177
Greene v. Wallwin	228	Hanson v. Garr	326
Greene's Est.	420	— v. Johnson	203
Greenby v. Kellogg	101	Hapgood v. Blood	229
Greenleaf v. Barker	143, 332	Hard's Case	92
— v. Francis	403	Hardeson v. Hays	202
— v. Bawdit	347	Haroon v. Belilios	460
	101, 391	Hardy v. Chesapeake Bank	271
Greenway, <i>Ex parte</i>	105		228
Greewel v. Ireland	45		55
Gregg v. Bigham	202		227
Gregory v. Brooks	409		234
Gresham v. Morrow	307	Harper v. Bird	101, 391
Griffin v. Chase	423	— v. Burgh	102
— v. Weatherby	302	— v. Charlesworth	227, 228
Griffith's Case	301	— v. Graham	333
	200	Harrington v. Deane	118
	430	— v. Duchatel	107
Groesbeck v. Seeley	432	Harris v. Blackhole	180
Groome v. Blake	200	— v. Carter	336
Grover v. Hoppock	350	— v. Cassidy	328
— v. Sims	301	— v. De Bervoir	118, 238
	379	— v. de Bevoice	117, 120
	234	— v. Du Pasquier	288
— v. Co.	375	— v. Finch	94
Gurin v. Cromartie	347	— v. McIntyre	413
Gurney v. Womeraley	275	— v. Watson	336
Guy v. McLean	107	— v. Young	301
Gyle v. Schoenbar	302	Harrisburg Club v. Athletic Assn.	379

Horton v. Smith	189	Ibgrave v. Lee	185
Horwood v. Smith	55	Ikerd v. Beavers	373
Hostler's Case	157	Illinois Co. v. Bonner	101, 391
Houlton, <i>Re</i>	415	— v. Budzisz	204
Houtiel's Case	91	— v. Jeka	204
How v. Norton	169	— v. Paczocha	204
Howard v. Duke of Norfolk	195	— v. Wakefield	199
— v. Mississippi Bank	270, 272, 274	Imperial Bank v. Hamilton Bank	280
— v. Wood	121, 164	Importers Bank v. Peters	420
Howard's Est., <i>Re</i>	294	Indep. Dist. v. Beard	422
Howe v. Johnson	216	— v. Fagen	201
— v. O'Malley	346	— v. King	423
— v. Watson	375	Indian v. Holtsclaw	281, 418
Howell v. Hair	202	Indiana Co. v. Porter	302
— v. Reynolds	302	Ingham, <i>In re</i>	267
Howison v. Baird	413	Ingram v. Porter	202
Howlet v. Osborne	134	— v. Bank	279
Hubbard v. Bliss	215	— v. Brame	409
— v. Farrer	332	Internat. Co. v. Greenwood	406
Hubbell v. Rochester	229	Iron City Bank v. Ft. Pitt Bank	270
Huber v. Merkel	403	Iron Co. v. Western Co.	379
—	237	Irvine v. Marshall	432
—	186, 216	—	462
— Co.	455	— Wetherald	279
—	82, 187	Irwin v. Ivers	430
— v. Lee	45, 49	Isaac v. Clark	63, 79, 82
— v. Stillwell	199	Iselin v. Chemical Bank	277
Huet v. De la Fontaine	110	Israel v. Douglas	302
Hughes v. Graves	199, 227	Ivey v. Owens	419
— v. Rowbotham	153	Jack v. Eagles	215
Hughs v. Pickering	204	— v. Walsh	199
Huling v. Fenner	290	Jacks v. Chaffin	200
Hull v. Bank	278	Jackson v. Cobbin	350
Hulme v. Sanders	88	— v. Cummins	158
Hume v. Dixon	257	— v. Dieffendorf	200
— v. Mazelin	350	— v. Harder	227
Humes v. Decatur Co.	328	— v. Hills	314
—	400	— v. Leonard	205
Humphreys v.	413, 415	— v. Olts	200
Hungerford v. Hutton	249	— v. Rogers	161
—	209	— v. Williams	302
— v. Elmes	267	Jacob v. Allen	164
— v. Orwig	101	Jacobs v. Calderwood	302
— v. Owing	391	Jacobson v. Von Boenig	401
— v. Peake	344	Jacoby v. Funkhouser	428, 429
— v. Sanders	426	Jaffray v. Crane	334
— v. Swain	325	— v. Davis	333, 334, 351
Hunt's Case	88	James v. Allen	288
Huntley v. Griffith	119	— v. David	349
Hurlbut v. Hurlbut	304	— v. Morgan	234
Hurst v. Harper	432	— v. Pritchard	190
Huston v. Williams	107, 109	Jarboe v. Severin	427
Hyde v. Kiehl	209		
— v. Noble	209		
Hyland v. Roe	424		

TABLE OF CASES.

499

King's Attorney v. Sands	313	Lawrence v. Davey	338
Kingsbury v. N. E. Co.	303	—— v. Wilson	216
Kingsford v. Merry	255		374
—— v. Oxenden	326		416
Kingston Bank v. Eltinge	284		344
Kinsey v. Bennett	428		186, 216
Kipp v. Synod	205	—— v. Jay	214
Kirbie's Case	232	Leagte v. Pinchion	172
Kirby v. Eccles	143	Leakins v. Clizard	145
—— v. Wilson	422	Leask v. Scott	138
Kirk v. Webb	412	Leath v. Simpson	268
	202	Leather Bank v. Merchants' Bank	276
	403	Leavers v. Clayton	281
	42	Leavitt v. Eastman	288
	418		228
Kliff v. Youmans	400		424
Knevit v. Poole	227		208
Knight v. Nelson	209		263
—— v. Rushworth	143		326
	303	Leffingwell v. Warren	198
Knox v. Cleveland	200	Lehman v. Gunn	413
Kromer v. Heim	349		179
Kuhn v. Webster	471		234
			429
La Comité v. Standard Bank	415	Le	187
	207	Le Neve v. Le Neve	317
Lacy v. McNeil	302	Leonard v. Bates	109
Ladd v. Noyes	101	Lester v. Bowman	305
	419		403
	415, 421	Leverett v. Townsend	232
Lambe's Case	41	Leverson v. Kirk	85
Lambert v. Bessey	436	Levett v. Hobbs	134
—— v. Thornton	35	Levy v. Levy	287, 288
Lamine v. Dorell	164, 415	—— v. U. S. Bank	270, 272
Lampet's Case	211	Lewis v. Campbell	391
Lamprey v. Lamprey	334	—— v. Harbin	112
	265	—— v. White's Bank	275
	402	Lacey v. Lacey	110
	169	Liening v. Gould	336
	412, 413	Liford's Case	230
	264		105
	375		165
	114		119
——, <i>Ex parte</i>	301		293
Lang v. Fiske	302		421, 422, 424
Langdon v. Hughes	347		163
Langford v. Pitt	375		216
Langton v. Lazarus	280		256
—— v. Waite	413		375
Lanier v. Ross	345		351
Lantermann v. Travers	423		337
Lantry v. Lantry	430		201
—— v. Wolff	203		374
Larmon v. Knight	430		415
Lattimore v. Harsen	337		228
Law v. Law	107		424

TABLE OF CASES.

501

McAuley's Estate	430	Meert v. Moessard	304
McCahill v. McCahill	433	. . . . .	112
McCaleb v. Price	325	. . . . .	293
McCarty v. Hampden Association	337	. . . . .	70, 183
McClellan v. Robe	301	Melroy v. Kemmerer	333, 334
McClure v. La Plata Co.	423	Melvin v. Proprietors	204
McComb v. Kittridge	351	. . . . .	35
.	202	Memphis Co. v. Organ	203
.	177	Menkens v. Blumenthal	203
.	200	. . . . .	70, 184
.	429	. . . . .	230
.	107, 109	. . . . .	415
McCune v. Norwich Co.	404	. . . . .	283
McDonald v. Hooker	428	. . . . .	420
.	199	. . . . .	279
.	200	. . . . .	280
.	200	. . . . .	281
.	178, 204	. . . . .	279
.	304	. . . . .	422
McGee v. French	215	Merchant's Co. v. Abbott	269, 278
— v. Overby	208	Meredith v. Meredith	430
McGill v. Doe	177	. . . . .	341
.	186, 216	Merrick's Est.	209
.	202	Merrill v. Bullard	202
.	200	. . . . .	428
Machin v. Thompson	202	. . . . .	237
McIntyre v. Canada Co.	199	Metcalf v. Brandon	430
.	282, 418	Methodist Church v. Clark	286
McKeage v. Hanover Co.	216	Methodist v. Campbell Co.	423
McKee v. Judd	216	. . . . .	281, 393
.	334	. . . . .	403
.	158	. . . . .	215
McKinney v. Burns	430	. . . . .	259
McKinnon v. Lundy	311, 314	. . . . .	101, 391
.	Bank . . . . .	. . . . .	316
.	270	. . . . .	316
McLaren v. Strachan	199	. . . . .	388
McLarin v. Hutchinson	346	. . . . .	46
.	430	. . . . .	200
McLeod v. Venable	413	. . . . .	204
McMahan v. Bowe	216	. . . . .	455
McMahon v. Williams	388	. . . . .	326
McMorris v. Webb	266	. . . . .	423
.	409	. . . . .	403
.	203	. . . . .	202
.	189	. . . . .	208, 209
.	258	. . . . .	426
McNichol v. Townsend	387	. . . . .	105
M'Quillin v. Cox	88	. . . . .	427
McRee v. Gardner	201	. . . . .	301
.	107	. . . . .	144
.	430	. . . . .	107
.	163	. . . . .	72
.	107	. . . . .	344
.	334	. . . . .	189
Medical Co., Re	301, 346	. . . . .	160
Medina v. Stoughton	138	. . . . .	304

Minot v. Baker	290	Mounteagle v. Worcester	85
Mitchell v. Hawley	109, 111	Mowry v. Todd	303
Mitford v. Reynolds	295	Moyce v. Newington	55, 256
Moffatt v. Buchanan	190, 207	Moynahan v. Agricultural Co.	344
— v. Shepard	413	Muhlenberg v. N. W. Co.	424
Mogul Co. v. McGregor	408	Mulcrome v. American Co.	301
Moller v. Presbyterian Hospital	385	Mulholland v. Conklin	200
Monnahan v. Judd	328	Mullens v. Big Creek Co.	378
Monckton v. Pashley	229	Mulligan, <i>Re</i>	413, 420
Monnier v. Renaud	406	Multnomah Co. v. Oreg. Bank	423
Montgomery v. Robinson	200, 203	Mumford v. Stohwasser	267
— v. Tipton	107	Munday v. Bailly	167
Moody v. Holcomb	201	Mundy v. Whittemore	114
Moor v. Russel	136	Munro v. Collins	413
Moore v. Bray	327	Munroe v. Perkins	337
— v. Campbell	430	Munson v. Hallowell	202
— v. Chesebrough	423	Murphy v. Christian Association	388
— v. Collishaw	205	— v. Dunham	186, 216
— v. Detroit Works	338	Murray v. Blackledge	175
— v. Hill	302	— v. Emmons	177
— v. Horsley	428	— v. Romine	201, 203
— v. Hussey	230	Murrell v. Goodyear	375
— v. Jervis	259	— v. Johnson	208
— v. Jordan	428	Mussett v. Bingle	293
— v. Luce	198	Mussey v. Johnson	111
— v. Metropolitan Bank	260	Mussleman's Ap.	376
— v. Moore	153	Muzzarelli v. Hulshizer	387
— v. Redding	350	Myrfyne v. Fallan	237, 238
— v. State	202		
Moore v. Bricklayers Union	408	Nagle v. Shea	206
Moran v. Dunphy	407	Nalder v. Harman	387
Mordant v. Watts	152	Nash v. Armstrong	350
Mordecai v. Tankersley	314	— v. Land Co.	201
Morgan v. Bradley	186, 217	Nat. Ass'n v. Cumming	408
— v. Ravey	159	Nat. Bank v. Bangs	270, 274, 275
— v. Varick	179, 230	— v. Barry	413, 415
—, <i>Re</i>	257	— v. Burkhardt	278
Morice v. Bishop of Durham	287	— v. Grocers' Bank	270
Morine v. Wilson	202	— v. Ins. Co.	413
Morland v. Cook	383	— v. McDonald	278
Morris v. Badger	332	— v. Seaboard Bank	280
— v. Beckley	208	— v. Steele	279
— v. Lutterel	110	— v. Tappan	270
— v. Lyon	201	— v. Westcott	280
— v. Munroe	326	Nat. Prot. Ass'n v. Cumming	406
— v. Robinson	208	Nebraska Bank v. Johnson	415
— v. Tuthill	401	Neck v. Gubb	167, 168
— v. Van Vorst	351	Nelson v. Brodhack	201
— v. Whitmore	307	Nelson's Case	95
Morrison v. Kinston	413	Nesbit, <i>Re</i>	385
Morse v. Satterlee	420	Nesbitt v. R. R. Co.	337
— v. Slue	134	Newby v. Blakey	202
Morton v. Burn	352	Newcomb v. Stebbins	203
Moses v. MacFerlan	164	Newcombe v. Leavitt	202, 204
Mosley v. Fosset	135	Newdigate v. Dary	163
Mt. Olivet v. Shubert	303	Newhall v. Langdon	215

Newis v. Topfer	431	Onely v. Kent	349
Newman v. Franco	107	Orand v. Mason	426
— v. Newman	214, 262	Orr v. Pockett	202
Newton v. Newton	257	Orth v. Orth	430
— v. Porter	415	Ortigosa v. Brown	258
— v. Preston	412	Osborn v. Osborn	301
— v. Sly	432	Osborne v. Bradley	385, 386
New York Co. v. Hamilton	388	— v. O'Reilly	337
Nichol's Case	109	Osgood v. Thompson Bank	268
Nichols v. Allen	288	Ostenson v. Severson	428, 429
— v. More	134, 155	Osterhout v. Roberts	208, 209
Nicholson v. Harper	114	— v. Shoemaker	314
Nickerson v. Thacher	227	Ostrander v. Scott	326
Nightingale v. Adams	70	Osway v. Bristow	228
Nisbit, Re	385	Ottinger v. Strasburger	200
Noble v. Nat. Co.	302	Outcalt v. Durling	207
Noice v. Brown	344	Overdeer v. Wiley	334
Noke v. Awder	391	Overfield v. Christie	203
Nonotuck Co. v. Flanders	424	Overton v. Williston 186, 187, 217, 218	
Norcross v. James	388	Owens v. Missionary Society	287
Norfeit v. Harris	189	— v. Owens	313
Norfolk v. Elliott	107		
Normant v. Eureka Co.	200	Pace v. Staton	200
Norment v. Smith	190, 204, 207	Packer v. Benton	301
Norrice's Case	152	Page v. Fowler	179
Norrill v. Corley	207, 208	— v. Robinson	229
Norris v. Fox	375	Palmer v. Stanley	429
— v. Fraser	430	— v. Staveley	163
Norris's App.	414	Pangburn v. Partridge	70
North v. Turner	216	Paramour v. Payne	146
North Bank, Re	424	Parham v. Dedman	199
Northern Co. v. Clark	420, 424	Parmelee v. Thompson	336, 350
Northwestern Bank v. Bank of Commerce	275	Parmenter v. Barstow	209
Norton v. Mallory	430	Park v. Pratt	216
Nottingham Co. v. Butler	385, 386	— v. Roser	280
Nugent v. Teachout	427	Park Bank v. Ninth Bank	270
		Parker v. Bristol Co.	88
Oakes v. Wood	400	— v. Metzger	200
Oakey v. Cook	375	— v. Nightingale	386
Oatway, Re	413, 421	— v. Parmele	109
Ober Co. v. Cochran	423	— v. Stone	304
Oberle v. Syndicat des Ouvriers	406	— v. Watson	112
O'Brien v. Perry	372	Parkhurst v. Bathurst	156
O'Callaghan's App.	424	Parry v. American Co.	428
Ockford v. Barelli	326	Partee v. Badget	202
O'Connor v. Gifford	294, 297	Partridge v. Messer	107
— v. Huggins	200	— v. Strange	174
Oddie v. Nat. Bank	279	Paschal v. Davis	202
O'Grady v. O'Grady	427	Pascoag Bank v. Hunt	414
O'Keefe v. Kellogg	186, 216	Passaic Works v. Ely	408
Oldbury v. Gregory	107	Pate v. Hazell	202
Oldig v. Fiske	203	Paterson v. Tash	117
Oliver v. Bank of England	394, 395	Patman v. Harland	385
Olmstead v. Latimer	350	Paton v. Robinson	216
Ommaney v. Butcher	288	Patton v. Beecher	428
		Paullin v. Hale	200

Pay v. Lawson	202	Philpot v. Briant	350
Payne v. Compton	253	Philpott v. Kelley	209
—— v. Hackness	426	Phoenix Co. v. Continental Co.	391
—— v. Western Co.	406	—— v. Rink	336
Peabody v. Fenton	261, 266	Piano Co. v. Auld	422
Peacock v. Burt	268	Pickard v. Collins	403
—— v. Peacock	427, 430	Pickas v. Guile	134
Peak v. Ellicott	423	Pilcher v. Rawlins	255, 267
Pearce v. Moore	175	Pill v. Towers	35
Pearson v. Thomason	334	Pinkett v. Wright	261
Pease v. Gloahac	256	Pinnel's Case	330
——, <i>Ex parte</i>	87, 117	Pintard v. Davis	112
Peck v. Conway	387, 389, 391	Pippin v. Sheppard	131
—— v. Loveden	95	Pirtle v. Price	415
—— v. Requa	338	Pitman v. Hill	201
Pecke v. Redman	78, 143	Plant v. Coterill	201
Pederick v. Searle	200	—— v. Woods	403, 408
Peetman v. Peetman	328	Pole v. Richard	147
Pell v. Pell	200	Pollard v. Bank of England	278
—— v. Towers	36, 37	—— v. Casy	232
Pendleton v. Alexander	200	—— v. McKenney	431
Pennell v. Deffell	420	Pollock v. Sullivan	344
Penny v. Watts	264	Pool v. Clipson	325
Penruddock v. Monteagle	159	Poole, <i>Re</i>	385
Penson v. Hickbed	213, 258	Pooley v. Gilbert	348
People v. American Co.	424	—— v. Harradine	112
—— v. City Bank	422	Poor v. Robinson	175
—— v. Merch. Bank	422	Pope v. Mason	249
—— v. Swift	278	—— v. Tucker	189
People's Bank v. Franklin Bank	270, 274, 275	Post v. First Bank	334
Perkins v. Cheairs	430	—— v. West	387
—— v. Lockwood	334	Postfiscus v. Imhof	278
—— v. Niggerman	426	Potter v. Fletcher	169
—— v. Perkins	430	—— v. Green	336
Perrot v. Austin	195	Powell v. Powell	202
Perry v. Clissold	206	—— v. Smith	179
—— v. Tuomey	294	Power v. Marshall	183
Perth Co. v. Middlesex Bank	424	—— v. Telford	202
Pete v. Tongue	352	Powtuary v. Walton	130
Peterson v. Breitag	326	Pratt v. Battels	179
—— v. Townsend	201	—— v. Eby	200
—— v. Union Bank	274, 278	Presgrove v. Saunders	69
Petticolas v. Richmond	209	Preston v. Breckinridge	175
Philadelphia Bank v. Dowd	422	—— v. Briggs	202
Philadelphia Club v. Lajoie	379	—— v. Canadian Bank	278
Philbrook v. Delano	430	—— v. Christmas	111
Philips v. Homfray	165	Price v. Blakemore	413
—— v. Robinson	79	—— v. Cannon	336
—— v. Thompson	120, 164, 415	—— v. Neal	278, 397
Phillips v. Covert	229	Prichard v. Thompson	287
—— v. Gray	303	Prince v. Broach	202
—— v. Kent	227	Prince de Wagan v. Marais	405
—— v. Monument Co.	303	Princess of Wales v. Liverpool	105
—— v. Phillips	253, 263	Prior v. Rillesford	130
—— v. Potter	107	Proprietors v. Call	229, 230
		Prosser v. Rice	267

505

Prout v. Pittsfield District	326	Rees v. Berrington	112
—	307	Reeve v. Palmer	72
—	202	Reeves v. Hearne	349
—	146	— v. Pierce	423
Pumfrey, Re	413	Reeves v. Dickey	376
Pundman v. Schoeneich	423	—	200
—	159	—	294
—	296	—	386
—	201, 207	Reubens v. Joel	387
— v. Story	119	Rex v. Cotton	310
— v. Woodberry	263	—	64, 181
Putney v. Dresser	328	—	55
Pybus v. Mitford	219	Reynolds v. Aetna Co.	246
Pye, Ex parte	148	— v. Morris	415
—	125	— v. Nugent	413
—	—	— v. Pinhowe	328, 340
—	—	— v. Sumner	331
Queen v. Justices	55	Rice v. Hartman	413
Quinn v. Earle	422	— v. Kelly	195
— v. Hanford	303	— v. London Co.	200, 203
— v. Leatham	399	Rich v. Aldred	334
—	—	— v. Kneeland	215
Rabbetts v. Stoker	111	Richards v. Bartlett	134
Radburn v. Jervis	99	— v. Green	332
Ragsdale v. Ragsdale	430	Richardson v. N. O. Co.	373
Railroad Co. v. R. R. Co.	383	— v. Oliver	422
Rain v. McNary	414	Riches v. Briggs	422
Rains v. Buxton	200	Rideout v. Knox	134
Rambery v. Hally	207	Rider v. Cobham	404
Ramey v. Stone	427	Riggs v. Fuller	49
Ramsdale v. Horton	302	— v. Palmer	203
Ramsdell v. Moore	430	— v. Riley	311
Ramsden's Case	88	Rineer v. Collins	199
Randall v. Constans	433	—	426
—	401	—	205
—	178	Ritenour v. Andrews	328
—	277	Roath v. Driscoll	403
—	268	Robbins v. Sackett	202
—	189	—	200
—	107	—	304
—	331	— v. Saunders	200
—	229, 230	— v. Winton	413
—	175, 216	Robertson v. Broadfoot	324
—	179	— v. Dunn	419
—	406	Robes v. Bent	417
—	200	Robinson v. Jewett	328
Rayner v. Lee	105, 115	— v. Nordman	203
Read v. Brookman	294	— v. Reynolds	276
— v. Hodgens	177, 245	— v. Webb	388
— v. Nash	159	— v. Weeks	216
— v. Palmer	287	— v. Woodward	424
— v. Williams	167, 168	Robsert v. Andrews	118
Reade v. Johnson	257	Robson v. Hamell	430
Redfearn v. Ferrier	445	Rochdale Co. v. King	114
Redgrave v. Hurd	405	Roe v. Haugh	299
Reding v. Kroll	280	Rogers v. Adams	114
Redington v. Woods	297	— v. Arnold	60
Reed v. Williams	—	—	—

Rogers v. Brown	177	St. Louis Asso. v. Austin	423
—— v. Colt	107	Salisbury v. Hatcher	376
—— v. Hosegood 385, 386, 387, 391		Salkill v. Shelton	69
—— v. Moore	208	Sallee v. Arnold	189
—— v. Richards	430	Salop v. Crompton	136
—— v. Rogers	337	Salt Bank v. Syracuse Inst. 270, 272,	274
Rohrbough v. Leopold	256	Salter v. Bird	430
Rolfe v. Flower	301, 346	—— v. Butler	86
Rollins v. Marsh	337	San Diego Co. v. Cal. Bank	423
Rook v. Denny	53, 83	Sanders v. Esterby	145
Rooke v. Rooke	153	—— v. Marke	90
Rooke v. D'Avigdor	46	—— v. Sanders	199
Roosevelt v. Doherty	456	Sanderson v. Caldwell	209
Roper's Case	52	Sands v. Thompson	200
Rosenbaum v. Gillian	401	—— v. Trevilian	144
Ross v. Duncan	296	San Francisco v. Fulde	205
—— v. Vertner	296	Saranac Co. v. Roberts	216
Rosse v. Brandstide	186	Saundre v. Gaynesford	237
Roswell v. Vaughan	137	Savage v. Blanchard	111
Rosyer v. Langdale	325	Savell v. Romsden	108
Rothenhale v. Wynchingham	237	Savile v. Roberts	442
Rotheram, <i>Re</i>	301	Savill v. Wolfall	106
Rous v. FitzGeggey	237	Sawyer v. Kendall	205
Rouvant v. San Antonio Bank 270, 274		Saxeby v. Wynne	215
Rowe v. Whittier	302	Sayre v. King	112
Rowell v. Satchell	385, 391	Scales v. Maude	126
Rowncevall v. Lane	169	Scarfe v. Morgan	158
Royal v. Lindsay	350	Scarth, <i>Re</i>	207
Rozer v. Rozer	94	Scattergood v. Sylvester	55
Rudder v. Price	88	Schafer v. Reilly	260
Rue v. Meirs	326	Schall v. Williams Co.	200
Ruggles v. Sands	229	Scheetz v. Fitzwater	204
Rummens v. Hare	256	Schneider v. Heinsheimer	338
Runde v. Runde	301	Schock v. Falls City	200
Rupp's App.	413	School District v. Benson	199
Russ v. Hobbs	334, 336	Schoonover v. Vachon	426
Russell v. Collins	154	Schouler's Pet.	294
—— v. Doyle	175	Schrimshire v. Alderton	456
—— v. Handford	230	Schroader v. Decker	114
—— v. McCall	209	Schuler v. Myton	328, 340
—— v. Pratt	184, 186, 187	Scot and Manby's Case	86
—— v. State	403	Scotson v. Pegg	328, 336, 340
Rust v. Conrad	378	Scott v. Atchison	302
Rutan v. Hinchman	426	—— v. Hallock	347
Rutledge v. Smith	430	—— v. Lunt	211
Ryan v. Bank	270	—— v. McAlpine	186, 216
—— v. Clark	228	—— v. M'Intosh	117
—— v. Williams	432	—— v. Nixon	200
Rycroft v. Christy	304	—— v. Perrin	107
		—— v. Stansfeld	401
Sadler v. Sadler	202	—— v. Stephenson	155
Sage v. Rudnick	199	Sealis v. Felbrigg	237
Sailor v. Hertzogg	199	Searcy v. Reardon	204
Sailors v. Gambrell	426	Sears v. Prentice	130
St. Albans Bank v. Farmers' Bank 274		Seaver v. Dingley	70
St. Louis v. Gorman	204		

507

Second Bank v. Western Bank	282	Shropshire Co. v. Queen	261
Security Bank v. Bank of Republic	280	Shuffleton v. Nelson	203
Seibert's	294	Garrett	162, 167
	424	Sibley v. Marian	296
	430		332, 334
v.	217		153
Sessions v. Johnson	209	Siddall v. Clark	334
Seventh Bank v. New York Co.	228	Sidenham v. Worlington	144, 157
	201	Siemon v. Schurck	432, 433
Seward v. Mitchell	346		397
Seybolt v. New York Co.	340	Simon v. Fox	202
	328, 340	Simpson v. Evans	350
	430, 433		281
v.	413		377, 379
Shampeon v. Connecticut Co.	107		423
Shandois v. Simpson	94, 144		154
Shannon v. Kinny	205		328
Shannon v. Shannon	70		429
Sharon v. Tucker	200		295
	207, 208		284
	386		167
	267		91, 145, 149
Sharrington v. Strotton	124, 148, 240, 241		130
Shaver v. Bear River Co.	345		422
Shaw v. McFarlane	112		334
Shaw v. Nicholas	203		424
Shaw v. Shaw	413		227
Sheehan v. Sullivan	428		60
Sheetz v. Fitzwalter	177		332
Shev v. Neagley	413		202
Sheffield v. Barclay	280, 304, 396, 397, 398		203
Sheldon v. Castleton	105		55
Shelden v. Hentley	102		92, 162
Shellenberger v. Ransom	311, 312		414
Shelburne v. Tierney	112		207
Shelbury v. Scotsford	190		432
Shelby v. Guy	202		333
Shelton v. Jackson	334		303
Shelton v. Osborne	134		403
Shenandoah Co. v. Dunlop	345		325
Shepherd v. Thompson	350		203, 205
Sheppard v. Gilmore	386		175
Sherin v. Brackett	204		373
Sherrington v. Strotton	139		427
Sherwood v. Central Bank	422		352
Shields v. Henderson	229		400
Shields v. Thomas	422, 424		325
Shirey v. Whitlow	199		186, 216
Shober v. Dutton	200		429
Shook v. State	336		301
Shoufe v. Griffiths	265		270, 282
Shrack v. Zubler	205		206
Shreve v. Grimes	426		101, 391
Shriver v. Shriver	200		208, 422

Smith v. Speed	403	Steeple v. Downing	216
—— v. Vow	88	Steinson v. Heath	161
—— v. Wunderlich	229, 230	Steptoe v. Harvey	112
—— v. Wyatt	334	Stettinische v. Lamb	200
Smith's Case	134	Stevens v. Kelley	403
Smith, Re	301	—— v. Sampson	404
Smullin v. Wharton	430	—— v. Williams	424
Snellgrove v. Snellgrove	266	Stevenson v. Brennan	268
Snelling v. Norton	95	—— v. Crapnell	428, 429
Sohier v. Coffin	175	—— v. Newnham	401
Solary v. Stultz	336	—— v. Pettis	344
Solling v. Broughton	206	Stewart v. Keteltas	337
Solt v. Anderson	373	Stickler v. Giles	350
South v. March	213	Stilk v. Myrick	336
South Bank v. Suffolk Bank	401	Stillwater Co. v. Farmer	403
Southwick v. First Bank	277	Stinson v. Caswell	303
Spalding v. Vilas	401	Stirling v. Forrester	156
Sparks Case	181	Stock v. Mawson	332
Spence v. Healey	111	Stockell v. Watkins	170
Spencer v. Handley	106	Stocker v. Wedderburn	372, 377
—— v. McDonald	202	Stockton v. Williams	216
Spencer's Case	389	Stockwell v. Phelps	178
Spicer v. Martin	387	Stogdel v. Fugate	186, 216, 217
Spiers v. Alexander	189	Stokes v. Berry	198, 200
Spivey v. Morris	208	Stoller v. Coates	423
Spokane Co. v. First Bank	420, 423	Stone v. Wythpool	325
Spoor v. Green	101	Stonehouse v. Bodvil	94
Spottiswoode v. Morris Co.	200	—— v. Stanshawe	234, 235
Sprecker v. Wakeley	200, 202	Stoneley v. Bracebridge	245
Sprigg v. Mt. Pleasant Bank	112	Stonestreet v. Doyle	286
Springfield Co. v. Jenkins	403	Storer v. Gt. West. Co.	383
Springwell v. Allen	138	Stoudermeier v. Williamson	337
Spuraway v. Rogers	160	Stout v. Benoist	270
Spycher v. Werner	302	Strangborough v. Warner	344
Squire v. Grevell	159	Straton v. Rastall	120
Staley v. Housel	201	Streaper v. Fisher	99
Stallings v. Johnson	350, 352	Strong v. Watts	152
Stamere v. Amonye	177	Stroud v. Hopkins	169
Standish v. Babcock	416, 421, 423	Struble v. Hake	301
Stanhope v. Verney	253	Stryker v. Vanderbilt	107
Stanian v. Davies	135	Stuart v. Wilkins	137
Stanley v. Bircher	159	Stubb v. King	107
—— v. Earl	202	Sturge v. Starr	264
—— v. Gaylord	230	Sturgis v. Galindo	379
—— v. Powell	437	Sturlyn v. Albany	143
Star Co. v. N. H. Bank	281	Sturtevant v. Sturtevant	428
Starke v. Checseman	162	Stuyvesant v. Dunham	227
Starkey v. Bank of England	395	Styron v. Bell	302
Starr v. Jackson	228	Suffern v. Townsend	229
State v. Bank of Commerce	422, 423	Suffolk v. Floyd	118
—— v. Foster	420, 424	Supreme Assembly v. Campbell	346
—— v. Midland Bank	423	Surtees v. Hubbard	302
Stean v. Anderson	229	Suydam v. Jones	101, 391
Stebbins v. Morris	432	Swaggard v. Hancock	325
Stedman v. Riddick	186, 217	Sweitzer v. Heasley	326
Steeds v. Steeds	111	Swett v. Cutts	403

Swift, <i>Re</i>	420, 422	Thornburg v. Bowem	202, 204
Swire v. Leach	59	Thorpe v. Holdsworth	257
Sykes v. Wales	86	Thrale v. Cornwall	102
Symcock v. Payn	168	Throckmorton v. Throckmorton	249
Symme v. Goodrich	333	Thuemmler v. Barth	424
Symonds v. Seabourne	232	Thurber v. Meves	375
Symons v. Darknoll	135	Thursby v. Warren	155
— v. Symons	60, 220, 230	Thurston v. Blanchard	87
Symson v. Turner	247	Tidd, <i>In re</i>	72
		Tiernan v. Jackson	302
Taft v. Dimond	428	Tierney v. Wood	263
Tailor's Case	227	Tilden v. Green	285, 287
Taitte v. Gosling	386	Tilford v. French	159
Talbot v. Chamberlain	177	— v. Torrey	413
— v. Rochester Bank	276	Times Co., <i>Re</i>	301, 346
Tallay v. Robinson	114	Tinkler v. Poole	87
Tallmadge v. East Bank	386	Tippin v. Cosin	245
Tardy v. Creasy	388	Tison v. Smith	376
Tarr v. Scott	345, 373, 377	Tobacco Co. v. Loder	161
Tate v. Wymond	112	Tobey v. Smith	190
Tatge v. Tatge	429	Todd v. Kauffman	199
Taub v. McClelland Co.	414	Tolhurst v. Powers	325
Taylor v. Blacklock	268	Tolles's App.	256
— v. Burnside	206	Tolman v. Waite	209
— v. Clarke	107	Tome v. Dubois	186, 217
— v. Horde	198	Tompkins v. Willshaer	117, 160
— v. James	70	Tonkin v. Croker	35
— v. King	315	Tooley v. Windham	325
— v. Owen	388	Topeka Co. v. Root	375
— v. Russell	283	Torrent Co. v. Mobile	200
— v. Sayles	430	Tottenham v. Bedingfield	120, 164
— v. Townsend	228, 230	Tourville v. Naish	108
— v. Turner	186, 216	Toussaint v. Martinnant	155
Tecumseh Bank v. Russell	278	Townsend v. Kerns	227
Telegraph Co. v. Harrison	379	Tracy v. Newton	200
Tenancy v. Brown	352	Traphagen v. Lyon	266
Ten Eyck v. Manning	373, 375	Traum v. Keiffer	202
— v. Witbeck	201, 216	Travellers Co. v. Caldwell	423
Tewksbury v. Howard	200	Travis v. Continental Co.	178
Third Bank v. Allen	275, 280	Trever v. Roberts	169
Thomas v. Barnes	337	Trim v. McPherson	200
— v. Heathorn	332	Trimmer v. Danby	293
— v. Shillaber	301	Troy Bank v. Grant	279
— v. Sowards	426	Truax v. Thorn	177
— v. Thomas	180, 314	Trubbe v. Miller	230
— v. Way	348	Truesdell v. Bourke	417
— v. Whip	170	Truscott v. King	260
Thompson v. Caldwell	202	Trustees v. Cowen	389
— v. Emery	303	— v. Hilken	200
— v. Harvey	107	— v. Lynch	389, 391
— v. Newlin	296	— v. Wheeler	260
— v. Percival	301	Trye v. Burgh	36
— v. Shattuck	100, 101	Tryon v. Baker	170
— v. Thompson	176	Tucker v. Bartle	336
— v. Toland	257	Tulk v. Moxhay	384, 389
Thorman v. Polye	301	Tunno v. Fludd	109

TABLE OF CASES.

511

Weber v. Couch	351	Wichals v. Johns	343
Webster v. Van Steenburgh	175	Wickes v. Wickes	203
Weisser v. Dennison	270	Wickham v. Freeman	229, 230
Welch v. Goodwin	275	Wier v. Davis	189
— v. Kenny	301	Wigg v. Wigg	261
Wellborn v. Weaver	189, 202	Wiggin v. Damrell	303
Wellner v. Eckstein	449	Wilburn v. Bogan	208
Wells v. Abrahams	46	Wilby v. Elgee	326
— v. Morrison	334	Wilcox v. Dunsmore	156
— v. Ragland	204, 207	Wild v. Harris	344
Wendover v. Pratt	325	Wilder v. Fessenden	301
Wentworth v. Skibles	428	Wildman v. North	69
Wescott v. Waller	334	Wiley v. Bradley	427
West v. Edwards	203	Wilhelm v. Voss	328
— v. Lanier	230	—	199
— v. Shuttleworth	294	Wilkins v. Wilkins	159
— v. Treude	229	Wilkinson v. Byers	331
Bank v. Reliance		— v. Clements	375
Society	268	— v. Johnston	271, 275
Westall v. Austin	376	— v. Verity	72, 209
—	327	Williams v. Archer	84
—	232	— v. Blumenthal	334
—	303	— v. Gibbs	93
Western ^{III}	391	— v. Graves	345
Western	403	— v. Hide	145
— v. Lawes Co.	443	— v. Ingersoll	263
Wetmore v. Bruce	389	— v. Jersey	114
Wetter v. Kiley	112	— v. Kershaw	288
Wharton v. Walker	302	— v. Ladew	403
Wheatley v. Baugh	403	— v. Lambe	266
— v. Lowe	72, 134	— v. Little	302
Wheaton v. Weld	202	— v. Lloyd	134
Wheeler v. Kirtland	416, 417	— v. Rank	278
— v. Montefiore	228	Williamson v. Cook	237, 238
— v. Sohler	100, 391	Willis v. Howe	205
— v. Taylor	203	— v. Peckham	327
Wheler v. Huchynden	234, 240	— v. Robertson	430
—	113	Wilson v. Barker	60
Whetstone v. Bury	244	— v. Campbell	201
Whistler v. Foster	274	— v. Coupland	302
White v. Continental Bank	280, 284	— v. Hill	303
— v. Drew	413	— v. Nance	216
— v. Garden	255	— v. Powers	350
— v. Howard	287	— v. Tappan	376
— v. Kuntz	334	— v. Taylor	101, 391
— v. Rice	286	— v. Williams	373
— v. Shorte	168	—	432
— v. Watkins	107	—	202
— v. White	238	— v. Second Bank	420, 422,
—	71, 72	—	424
—	105	Wing v. Jackson	38
—	279	Wingfield v. Littleton	249
—	64	Winsmore v. Greenbank	443
—	383	Winston v. Miller	423
—	147	Winter v. Belmont	257
Whyte v. Whyte	237	Wirral v. Brand	144

Wishart v. McKnight	205, 206	Wright v. Campbell	106
Withy v. Mumford	391	—— v. McCully	301
Witt v. St. Paul Co.	205	—— v. Ritterman	207
Wittmer v. Ellison	112	Wyandot Co. v. Sells	403
Woadson v. Newton	190	Wyche v. Macklin	107
Wolford v. Farnham	428	Wylson v. Dunn	376
Wood v. Corcoran	301	Wyman v. Ballard	391
—— v. Foster	215	—— v. Dorr	66
—— v. Reignold	256	Wynn v. Lee	202
—— v. Vandeburgh	293		
Woodford v. Deacon	153	Yale v. Edgerton	301
Woodhouse v. Bradford	95	Yancy v. Yancy	202
—— v. Crandall	422	Yates v. Donaldson	112
Woodland v. Fear	278	Yeary v. Smith	336
Woodlife's Case	116	Yevance v. Holcomb	232
Woods v. McGee	215	York v. Town	162
——, <i>Re</i>	415	Youmans v. Edgerton	278
Woodward v. Aston	164	Young v. Ashburnham . 89, 154, 439	
Woolaston v. Webb	348	—— v. Cole	275
Wooley v. Carter	207	—— v. Ferguson	186, 217
Worcester's Case	55	—— v. Lehman . 270, 275, 276, 280	
Works v. Hershey	333	Youngs, <i>Re</i>	420
Wormleighton v. Hunter . . 156, 327			
Worthen v. Thompson	325	Zinck v. Walker	117

TABLE OF OTHER AUTHORITIES CITED.

	PAGE
Abbreviatio placitorum, 31, col. 1	125
55, col. 2	98
62, col. 1	41
107, col. 1	45
126, col. 2	44
132, col. 2	183, 225
134, Leyc. 17	224
134, Sum. 19	224
134, Gl.	178
138, Leyc. 17	224
142, col. 1	183, 225
143, col. 1	64
184, col. 1	50
262, col. 1, Cant.	225
262, col. 1, Essex	225
262, col. 1, rot. 18	183
265, col. 2	60, 181
280, col. 2	52
284, col. 2	98
348-349	67
Adams, Ejectment, 4, 5	222
Adams, Equity, Introd. xxv	233
American Law Register, 49; 270, 384, 445, 507, 559	370
50; 65, 251, 329, 523	370
34, N. S., 636	313
American Law Register and Review, 36, 225	449
American Law Review, 30, 130	314
Ames, Cases on Bills and Notes, 1, 433 n. 2	281
2, 82 n. 2	112
2, 242 n. 1	275
2, 811	480
2, 873	90
Ames, Cases in Equity Jurisdiction, 1, 64 n. 1	460
1, 78 n. 1	383
1, 102 n. 1	377
1, 141 n. 2	382
1, 149 n. 1	384
1, 152 n. 1	385
1, 172 n. 1	386
1, 173 n. 1	385
1, 180 n. 1	386
1, 187 n. 1	388
1, 240 n. 1	381

	Page
Ames, Cases in Equity Jurisdiction, 1, 251 n. 1	373
1, 421 n. 1	374
1, 428 n. 2	372
1, 430 n. 3	375
1, 431 n. 2	378
1, 659	443
Ames, Cases on Trusts, 189	263
323, 325 n. 1	412
428, 429, 432 n. 1	263
433	263
501, 511 n. 1	197
531 n. 1	255
532	255
533	261
534 n. 2	267
537, 541 n. 1	268
542	260, 268
551 n. 1	261
552, 552 n.	260
553	260
Ames, Cases on Trusts, 2d ed., 1 n. 3	119
4 n. 1, n. 2	119, 239
52, n. 1	239
109	240
282-285	76
374 n.	75
423 n. 1	460
423 n. 1, par. 2	461
Ames & Smith, Cases on Torts, 1, 247 <i>et seq.</i>	64
1, 252, 253 n. 1	62
1, 274, n. 3	87
1, 548, 549 n. 1	402
Anderson's Reports, 1, 37 pl. 96	244
1, 294	245
1, 313	244
2, 7, pl. 5	232
2, 136	244
Anson, Law of Contracts, 108 n. 1	335
2d ed., 346	453
8th ed., 91, 92	328, 342
Antiquary, The, 4, 185	126, 143
5, 38	143
Bacon's Abridgement, 4, 395	69
Bacon's Statute of Uses, 8, 9	245
13, 14	241
30	245
Baudry-Lacantinerie, Droit Civil, 21, § 897	455
Bédarride, Lettre de Change, 2d ed., § 377	274
§ 380	275
Bell, Principles of Law, 6th ed., 637	260
Bellewe's Reports, Acc., 7	118, 239
Collusion, 99	236
Det. of Chart.	71, 82
Ed. 1869, p. 32	124
p. 111	104, 124

TABLE OF OTHER AUTHORITIES CITED.

515

	PAGE
Benjamin on Sales, 3d ed., 620-631	138
Benloe & Dalison's Reports, 16, pl. 20	147
Bigelow, Estoppel, 4th ed., 489, 490	190
Bigelow, Placita Anglo-Normannica, 2, 9	224
89, 98, 102, 127	179
166	224
285	45
Bigelow, Leading Cases on Torts	224
Bishop, Married Women, 1, § 71	189
1, § 509	176
Blackburn, Contract of Sale, 190-196	77
Blackstone's Commentaries, 1, 431	132
2, 196	193, 198
2, 199	193
2, 335	243
2, 442	213, 258
2, 452	215
3, 140	70
3, 165	161
3, 196	198
Booth, Real Action, 2d ed., 285	181
Bracton de Legibus et Consuetudinibus Angliae:	
Folio Twiss' ed., vol. and p.	
6 b	1, 44 219
16 b, 17	1, 131 113
17 b	1, 139 211
37 b	1, 294 100, 211
52 a	1, 413 198
100 a	2, 117 123
100 b	2, 119-121 104, 108, 122
103 b	2, 143 57
134 b	2, 384 41
136 b	2, 398 41, 178
144	2, 458 41
145	2, 464 41
145 a	2, 467 48
145 b	2, 470 41
145 b	2, 472 44
146	2, 473 48
146	2, 474 41, 57
146 b	2, 478 41
147	2, 480 41
148 b	2, 494 41
150 b	2, 508 41, 50, 81
150 b	2, 510 44
151	2, 513-515 57
155	2, 545 178
161 b	3, 15 181
162 a	3, 18 221
162 b-164 b	3, 25 221
163	3, 27 219
164	3, 33 60, 220
164	3, 35 220
164 b	3, 39 219
165 a	3, 40 177, 221
165 a	3, 41 206, 220

Bracton de Legibus et Consuetudinibus Angliæ:		Page
Folio	Twiss' ed., vol. and p.	
165 b	3, 44	221
167 b	3, 62	221
168 a	3, 64	221
168 b	3, 71	220
172	3, 97	61, 220
172	3, 99	220
175 b	3, 109	220
175 b	3, 111	220
178 b	3, 133	220
183 b-184 b	3, 172-182	221
186 b-187 b	3, 197-205	220
195 b	3, 271	221
196 a	3, 274	221
204	3, 339	220
204	3, 341	220
204 b	3, 343, 345	220
205 a	3, 349	220
209 b	3, 382	221
210 a	3, 390	221
212 b	3, 408	221
214	3, 420	221
216 b	3, 440	226
220	3, 469	221, 222
220 b	3, 473	222
223 b	3, 496	222
233	3, 565	178, 231
376	5, 456	174
381 b	6, 10	100, 211
300, 391	6, 78, 86	100, 211
306 b	6, 125	98
407 b	6, 213	95, 99
413	6, 257	224
Bracton's Note Book, No. 50		125
	67	51
	76	220
	158	222
	182	113
	200	113
	287	224, 225
	373	225
	378	183, 224
	401	220
	617	60, 61, 220
	804	211
	824	51, 81
	1084	48
	1115	80
	1191	61, 220
	1435	51
	1520	224, 225
	1643	113
	1664	59
	1803	125
	1913	113

TABLE OF OTHER AUTHORITIES CITED.

517

PAGE

Britton, Ancient Pleas of the Crown:

Folio	1 Nich. Brit.	
19	47	113
22-24	55-60	50, 178
22 b	56	57
23 b	59	50
27	68	62, 66, 80, 182
28	70	236
43 b	109	41
45 b	114	41
46	116	80, 178
46 b	117	54
48 b	122	41, 47, 48
49	123	41, 44, 179
49 b	124	45, 47, 48
53 b-61 b	135-154	65
54 b	138	61, 66, 182
62 b, 64	157, 162	123
81 b	206	206
85	215	62, 182
86 b	219	185
87 b	221	185
88	223	113
89 b	226, 227	181
100 b	255-256	211
106	269-270	99, 211
108	274	221
108	275	221
108 b	276	221
109	277	220
109 b	278	181, 221
112 b	287	181
115	293-294	219
133 b	343	226
138 b	356	220
138 b	358	220
155 b	403	178, 231
160	417	221
176 b	2 Nich. Brit. 46-48	210
Brooke's Abridgment:	Act. on Case, pl. 5	146
	72	144, 249
	105	145
	Conscience, pl. 25	239
	Disceit, pl. 29	142
	Distresse, 67	158
	Ej. Cust. 8	180
	Estray, 1	78
	4	78
	Feoff. al Uses, 16	239
	40	147, 244
	54	78, 148, 239, 240, 244
	Replev. 8, 20	69
	39	183, 185
	Trespass, 46	228
	141	229
	169	228

	Page
Brooke's Abridgment: Trespass, 221	59
227	227
256	280
291	228
303	228
312	228
358	180
362	229
365	228
382	69
430	228
433	190
529	228
Browne, Statute of Frauds, 5th ed., 495, n. 1	344
Brownlow, Entries, 11	134
26	118
Brunner, Deutsche Rechtsgeschichte, 1, 495	52
1, 509	58
Brunner, Geschichte d. Schwerger.	42
Burrow's Reports, iii, 1354	270
Caillemer, L'Exécution Testamentaire, c. IX	237
Calendars in Chancery, 1, 41	92, 248
1, 93	95
1, 124	130
2, 2	144, 248
Canada Law Journal, 20, 461	313
32, 337	313
34, 247	313
39, 217	313
41, 377	313
42, 133	313
Carlin, Niemand kann auf einen Andren mehr Recht übertragen, 42, 48	73
Challis, Real Property, 329	181
Chalmers, Bills of Exch., 3d ed., 196	271
Chitty, Pleading, 1st ed., 2, 271	134
7th ed., 1, 104, 138	71
1, 127-128	88
1, 137	184
1, 351, 721	89
2, 458	131
2, 506, 507	135
Choice Cases in Chancery, 148	143
270	105
Coke, Entries, 38, pl. 31; 40, pl. 32; 169 d, pl. 2	80
Coke, Institutes, 2, 143	36
2, 148	435
2, 312	37
2, 390	37
4, 266	37
Coke, Law Tracts, 322	99
Coke on Littleton, 9 b	196
47 b	124
57 a, n. (3)	181
63 b	228
102 a	138

TABLE OF OTHER AUTHORITIES CITED.

519

	PAGE
Coke on Littleton, 117 a	176
118 b	176
144 n. (236)	99, 211
145 b	69, 70, 189
212 b	330
238 a	219
239	198
266 a	174
274 a, n. (237)	196
292 b	124
322 a	211
351 a, b	189
384 b, n. (r) and (s)	100
Coke's Reports, 1, 139 b, 140 a	245
Columbia Law Review, 9, 116, 130	453
Comberbach's Reports, 334	159
371	134
447	163, 164
Common Law, The, 285	129
373-374	211
Common Pleas, 53	145
Compleat Attorney, 86	86
265	246
Comyn's Digest, 1, Assumpsit, C. pl. 6	169
2, 470, 471	37
2, 472 (County C. 11)	36
5, Trespass B. 1	227
B. 2	228
B. 3	228
Cooley, Constitutional Limitations, 365	199
Cooley, Torts (2d ed.), 109, 110	165
Copinger, Title Deeds, 2, 4	256
Cornish, Uses, 41, 42	243
Croke's Reports, Elizabeth, 46	229
79	144
James, 4	438
Crompton on Courts, 54 a	245
58, 59	246
62 a	244
66 a	95
Cruise, Digest, 4th ed., 1, 381	243
Dalison's Reports, 49, pl. 13	330
84, pl. 35	146, 150
Daniel, Negotiable Paper, 2, § 1361	274
Dart, Vendors and Purchasers, 6th ed., 1, 464-466	205
Digby, Property, 3d ed., 328	246
Doctor and Student, I. c. 12	110
II. c. 6	110
c. 22, 23	144
c. 24	125, 140, 143, 144
18th ed., Appendix, 17	110, 127, 144, 240
Duranton, Cours de Droit Français, 12, § 332	277
13, § 685	284
Dyer's Reports, 5 a, pl. 1	178
14	111

	Page
Dyer's Reports, 25, pl. 60	109
30, pl. 301	91
51, pl. 15	109
155, pl. 20	244
Equity Cases Abridged, 2, 522	114
Endemann, Handbuch d. Handels-, See- und Wechselrecht, 3, 1102, 1115	277
English Encyclopedia of Law, 3, 341	341
Entscheidungen des Reichs-Gerichts, 1, 116	455
2, 43	455
Entscheidungen des R. O. H. G. 16, 24	455
Erleben, Conditiones sine Causa, 156 <i>et seq.</i>	277
Essay on Bills of Exchange, 10	275
Ewart, Estoppel, 246	462
Famone, Il Codice Civile, 454-455	275
Farresly's Reports, 12	162
Finch, Law, Bk. 2, c. 15	187
Bk. 3, c. 6	173
150	160
Fitzherbert, Abridgment, fo. 15, pl. 5	349
Acc., 45, 46, 47	118
108	118
Accion sure le case, 37	130, 132
51	232
Act., 108	239
Assise, 437	231
Avow., 151	53, 173
Brefe, 644	79
Cor., 21	53
26	53
44	49, 54
71	53
95	53, 173
100	51, 57
125	51
157	51
162	53, 173
190	52
194	53
268	51
278	43, 54
279	43, 54
318, 319	53, 173
367	53, 173
375	51
379	52, 53, 173
380	53
392	52, 173
460	54
466	53
Covenants, 25, 28, 30	102
Dett, 135, 141, 165	99
166	104
Ejectio Firmæ, 2	223

TABLE OF OTHER AUTHORITIES CITED.

521

	Page
Fitzherbert, Estray, 3	78
Forf., 15	53
Garr., 93	211
Monst. de Faits, 160	136
22	72
Prohib., 15	125
Prop. Prob., 3, 4	68
Quare ejecit	222
Replevin, 32	59
43	188, 189
Replic., 60, 70	187
Subp., 19	237, 238
23	147
Tresp. 433	190
Fitzherbert's Natura Brevium, 100	64
145	102, 211
184 g	231
Fleta, 55, 63	81
59	48
219	220
250	222
275, 276	226
I, c. 30, 31, 35, 36, 37	41
c. 38	41, 50
c. 39	41, 57
c. 40	41, 48
c. 41	41, 48
c. 42	41, 48
II, c. 60	90
213 n.	195
Freeman, Executions, 2d ed., s. 112	189
Chancery Cases, 145	213, 258
Fry, Specific Performance, 2d ed., 3	248
3d ed., 215	370
3d ed., 217	377
Gale, Easements (74) 10	389
Gide, Novation, 421	377
Gilbert, Distress, 115, 117	68
Uses, 52	78
161	244
162	247
Glanvill, X, c. 12	122, 123, 125
c. 15	50
c. 16	51
c. 17	50
c. 18	123
XII, c. 12	65
Godbolt's Reports, 13	146
49	35
98, pl. 12	146
318	181
Goldsborough's Reports, 55, pl. 8	176
162, pl. 196	175
Gray, Perpetuities, §§ 78-98	195

	PAGE
Green Bag, 3, 3	126
6, 534	314
Hale, Pleas of the Crown, 1	58
Hare, Contracts, 136-137	145
138-139	139
162	139
ch. vii and viii.	129
Hargreave, Law Tracts, 334	127, 144, 240
Harriman, Contracts, 65	350
Harvard Law Review, I, 3, 4	282
I, 6 n. 2	213
I, 104	371
II, 1	129
II, 9	442
II, 11 n. 1	240
II, 13	442
II, 15	93
II, 18, 19	78
II, 52	214
II, 53	149
II, 56	241
II, 58	214
II, 62	349
III, 29	61
III, 32	62
III, 173-175	222
III, 321-322	318
III, 341	302
IV, 297	393
IV, 307 n. 3	397
IV, 394	312, 314
VI, 398-399	92
VIII, 27	350
VIII, 35	342
VIII, 170-171	313
VIII, 253 n. 3	144
VIII, 256	143
IX, 50 n. 1	440
IX, 51	441, 445
IX, 52	440, 441, 445
IX, 54-55	441-445
IX, 57-58	315
XI, 135	474
XI, 205	474
XII, 151	474
XII, 365	474
XII, 528 n. 2	353
XII, 533	474
XIV, 406	474
XVI, 553	474
XVII, 41	474
XVIII, 1, 83, 245	474
XIX, 1, 79	474
XIX, 151	475
XIX, 233, 321	474

523

	PAGE
Harvard Law Review, XXI, 262	444
XXI, 265	445
Hayes, Conveyancing, 5th ed., I, 52	243
I, 270	198
Haynes, Defense of Purchase, Ch. III	254
Herne's Pleader, 76	134
170, 249	134
Heusler, Die Gewere, 487	73
Holmes' "Common Law," 155 n. 1	135
260-264	90
267	93, 139
285	139
286	157
287	143
340-341	211
371	100
Holmes, Early English Equity, 1 L. Q. Rev. 171	129, 236
172-173	144
Huffcut, Agency, 166	453
Hutton's Reports, 101	331
Impey's King's Bench, 5th ed., 486	145
Instructor Clericalis, 185	135
Irish Law Times, 25, 423	314
29, 66	314
Jarman, Wills, 4th ed., I, 49	175
Jenkins, Century Cases, 108	107
Jenks, Doctrine of Consideration, 134	93
Jobbé-Duval, La Revendication des Meubles	52
80, 165	73
Jones, Mortgages, 4th ed., I, § 924	308
Keener, Cases on Quasi-Contracts, 2, 606, 607 n. 1	165
Keener, Quasi-Contracts, 417	163
Keilway's Reports, 1, pl. 2	230
42, pl. 7	75, 76, 227
46, pl. 2	227
50, pl. 4	130, 140, 161
70, pl. 7	57
77, pl. 25	130, 133, 135, 142
91, pl. 16	137
114, pl. 51	116
130, pl. 99	224
154, pl. 3	114
160, pl. 2	84, 85, 133
Kent, Commentaries, 13th ed., IV, 177-179	268
Knorr, in Archiv für die Civilistische Praxis, 42, 318	283
Langdell, Summary of Contracts, § 47	129
48	145
54	328
64	143
84	341
89	350
92	157

	Page
Langdell, Summary of Contracts, §§ 93, 94	157
§ 100	150
Langdell, Summary of Equity Pleading, 2d ed., § 122	197
§ 189	265
§ 194	265
Latch's Reports, 148	105
Law Quarterly Review, I, 162	233
I, 168	237
I, 171-174	90, 236
I, 332	221
II, 481	174
II, 486	176
II, 487, 488	177, 181
II, 495	211
III, 178	147
III, 179	145
III, 359	453
IV, 24	221
IV, 29	178
IV, 30	219
IV, 31, 35	178
IV, 330-336	197
IX, 111	462
XIV, 5	453
Law Times, XCI, 261	314
Leake, Contracts, 2d ed., 99	327
619	350
1183	213
Leake, Property, 125	243
Leonard's Reports, I, 208	152
III, 13	232
III, 38	117
III, 119	152
III, 260	89
IV, 81	330
IV, 99	259
IV, 167, 224	232
Lewin, Trusts, 8th ed., 819	245
Liber Intrationum, 21	75
22	78
28 a	78
71	83
84	78
Lilly's Abridgment, 125	213
Littleton's Reports, 3	125
Maitland in 2 L. Q. Rev. 486	176, 211
Maitland in 4 L. Q. Rev. 29	178
Manning's Note, 6 M. & G., 160 n. a	207
Mirror of Justices, Seld. Soc'y, Bk. II, c. 13	50
II, c. 16	57
III, c. 13, p. 98	78
III, c. 19	45
Modern Reports, I, 170	35
II, 100	116
XI, 70	405

TABLE OF OTHER AUTHORITIES CITED.

525

	PAGE
Modern Reports, XII, 3	161
Moore's Reports, 45, pl. 138	244
Moyle, Justinian, 466	214, 302
Mugdan, Die Gesamt-Materialien zum B. G., II, 407	409
Natura Brevium (French folio ed.), 49 b	102
Northumberland Assize Rolls, 79	50
88	43, 48
366	48
Nouguier, Lettre de Change, 4th ed., § 325	280
Novae Narrationes, 65	81
68	71
Odgers, Libel and Slander, 3d ed., 202	402
292	404
Old Natura Brevium, Rast. L. Tr., 67	211
ed. 1525, 134 a	222
ed. 1528, 134 b	223
Owen's Reports, 3	99
Pardessus, Cours de Droit Commercial, 3d ed., II, 501	271
II, 505	274, 275
II, 506	280
Parsons, Contracts, 8th ed., 452	327
458	326
Essays, 98	244
Perkins, Conveyancing, § 92	185
§ 101	99, 214
§ 366	176
Profitable Book, ed. 1545, fo. 141	330
Phillips' Reports, II, 62	377
Planiol, Droit Civil, II, § 2271	455
Platt, Leases, I, 50	174
I, 51	177
Plowden's Reports, 298, 308	148
Pollock, Contracts, 206	258
245	461
1st ed., 158	341
4th ed., 144	145
179	341
5th ed., 206	211
701	213
6th ed., 136	123
175-177	238
176	350
8th ed., 142	436
2d Am. ed., 204 n.	119
Pollock in Harvard Law Review, 6, 398	92, 111
Pollock in Law Quarterly Review, IX, 111	462
Pollock and Maitland, History of English Law, II, 174	82
II, 232 <i>et seq.</i>	236
II, 487	48
II, 495	50
Pollock and Wright, Possession	205
97, 99	206
169	180

	PAGE
Pomeroy, Equity Jurisprudence, I, §§ 430, 431	317
Remedies (2d ed.), §§ 568, 569	105
Specific Performance, 2d ed., 229	370
Popham's Reports, 205	105
Pothier, Mandat, § 80	459
Obligations, No. 256	284
Preston, Abstracts of Title, II, 206	209
Rastell's Entries, 2, b, 1	130
4, d, 1	85
8, 1	85
463 b	132
Rastell's Law Tracts, 67	211
81 d, e	222
81 i	223
408, 1	37
410 b, c, g	36
Rawle, Covenants, 4th ed., 318, 319, 5th ed., § 205	101
4th ed., 362, 374, 5th ed., §§ 232, 236	102
Reeves, History, I, 338, 9	224
Registrum Brevium, 105 b	130
Riley, Memorials of London, 45	98
68	213
447	98
Roberts, Wills, 3d ed., II, 31	316
Rolle's Abridgment, I, 2, pl. 4	134
I, 6, pl. 4	134
I, 7, pl. 3	159
I, 27, pl. 53	331
I, 94, pl. 1	132
I, 95, pl. 1	132
I, 104, L. 5 and 6	232
I, 375, pl. 1	105
I, 518, pl. 2, 3	148, 152
II, 2, 41, G. 2	256
II, 85, pl. 4	158
II, 92, pl. 1, 2	157
II, 433 K. 1	69
II, 551, 1, 46	228
II, 553, Q. 1, 2	173
II, 561, G. 7	62
Roper, Husband and Wife, Jacob's ed., I, 169	183
Rotuli Curiae Regis, I, 42	215
I, 51	59
II, 4	44
II, 34	179, 224
II, 51	44, 224
II, 91, 92, 103	44
II, 207	109
II, 230, 278	44
II, 451	172
Rotuli Parliamentorum, III, 137 a	72
III, 511, No. 112	237
V, 139 b	60, 181
Russell, Crimes (5th ed.), II, 245	58
Salmond, Jurisprudence	213

TABLE OF OTHER AUTHORITIES CITED.

527

	PAGE
Salmond, History of Contracts, 3 L. Q. Rev. 166	129
173	144
178	129
179	145
Sanders, Uses, 2d ed., I, 200	243
5th ed., I, 2, 3	245
II, 57	78
Saunders' Reports, 6th ed. 47 b. n. (c)	64
Williams' ed., 47 c	180
Schouler, Bailments, 2d ed., § 122	158
Schroeder, Lehrbuch d. deutschen Rechtsgesch., 346	52
Schulze, Die Langobardische Treuhand, 145	237
Scribner, Dower, 255, 256, 353, 354	178
Selden Society Publications, I, 4, 9, 11, 24	48
I, 35	56, 225
I, 67	178
I, 88	57
I, 124	51
I, 126	57
I, 192	51, 54
II, 10	60
II, 31	80
II, 138	71
II, 141	41
IV, 114-118	93
IV, 144	80
VI, xl	52
X, 116	73
Select Cases in Chancery, see Selden Society, Vol. X.	
Select Pleas in the Court of Admiralty, see Selden Society, Vol. VI.	
Select Pleas of the Crown, see Selden Society, Vol. I.	
Select Pleas in Manorial Courts, see Selden Society, Vol. II.	
Selwyn's Nisi Prius, 1st ed., II, 1362	64
13th ed., I, 91	156
I, 348	134
Seuffert's Archiv, XIII. 246	283
XXIV. 234	283
XXXI. 27	283
XL. 103	283
XLIII. 212	278
Sheppard's Actions on the Case, 2d ed., 49	155
50	154
155-156	327
178	345
Sheppard's Faithful Counselor, 2d ed., 124	155
125	154
131	328
Sheppard's Touchstone, 6th ed., 240, 241	186, 213
507, 510	246
Shower's Reports, II, 183	89
Smith's Leading Cases, 7th ed., I, 152	101
Smith, Mercantile Law, 9th ed., 128	117
Sohm, Der Process d. Lex Salica	52
Solicitors' Journal, XXXVII, 280	462
XLVII, 793	385
LI, 141, 155	385

	Page
Spedding's Bacon, 1879 ed., VII, 403, 404	241
Spence, Equity Jurisdiction, I, 490	243
I, 491	246
I, 602-603, 629	445
I, 645	248
I, 694	156
II, 850	211, 258
Statham's Abridgement, Act. on Case	133
Detinue, 4	74
9	72
Quare Ejecit	222
Transgressio, 13	226
Statutes, English: William I	67
Assize of Clarendon	42, 52
Constitutions of Clarendon, c. 15	125
52 Henry III (Marlbridge)	37
6 Edw. I (Gloucester)	37, 60, 220
6 Edw. I, c. 8	47, 57
c. 9	436
13 Edw. I (Circumspecte Agetis)	125
13 Edw. I (Westminster II), c. 24	231, 442
4 Edw. III, c. 7	187, 210
22 Edw. III	54
50 Edw. III, c. 6	237
1 Rich. II, c. 9	237
2 Rich. II, St. 2, c. 3	237
15 Rich. II, c. 5	237
21 Rich. II, c. 3	237
3 Henry VII, c. 1	50
27 Henry VIII (Uses)	54, 238, 241, 245
32 Henry VIII, c. 16	215
c. 33	219
James I (Limitations)	198
21 James I, c. 16	201
Charles II (Frauds)	95, 117
4 & 5 Anne, c. 16	212
16 Geo. II, c. 19	167, 170
3 & 4 William IV, c. 27, § 34	201
c. 105	176
8 & 9 Victoria, c. 106, § 6	174
8 & 9 Victoria (Common Law Procedure Act)	86, 106
24 & 25 Victoria, c. 96, § 100	55
47 & 48 Victoria, c. 71, § 4	197
Statutes, British Colonies: British Columbia, 1904, c. 19, § 25	333
Indian Contract Act, § 63	333
Statutes, American: Alabama, Code, § 2774	333
California, Civil Code, § 1524	333
Connecticut, Rev. Stat., 1875, 354, § 15	175
Dakota, Civil Code, § 681	175
Comp. Laws, § 3486	333
Georgia, Code, § 3735	334
Maine, Rev. St., c. 82, § 45	334
Massachusetts, Rev. St., c. 62, § 2	175
New York, Rev. St., c. 101, § 5	219
c. 406, § 77	109
New York, Statute on Seals	109

TABLE OF OTHER AUTHORITIES CITED.

529

	PAGE
Statutes, American: North Carolina Code, § 574	334
North Dakota, Rev. Code, § 3827	334
Oregon, Hill's Ann. Laws, § 755	334
Tennessee, Code (1884), § 2446	175
§ 4539	334
Shannon's Code (1896), § 6884	406
Virginia Code (1897), § 2858	334
Staub, Commentar v. Handelsgesetzbuch, 1739	455
Staunford, Plee del Corone, 60 b	187
61 a	180
62	54
107	43, 49
165, 166	54
Stephen, History Criminal Law, I, 248	49
Stobbe, Handbuch d. deutschen Privatrechts, III, 181	283
Story, Bailments, 8th ed., §§ 85-87	161
Equity Jurisprudence, 12th ed., §§ 413-419	268
Promissory Notes, 7th ed., 526 n. 5	275
Strange, Reports, I, 407	164
Stubbs, Constitutional History, 135	35
Select Charters, 145	42
300	38
Style's Reports, 31	90, 152
400	169
Sugden, Powers, 7th ed., 163-165	244
Vendors and Purchasers, 14th ed., 791-798	253
Sugden's Gilbert on Uses, 347 n. 1	243
 Taunton's Reports, VI, 76	 274
Tiffany, Agency, 232-233	453
Tothill's Reports, 26, 27, 81, 84, 86	107
188	246
 Ventris' Reports, I, 69	 159
I, 258	331
I, 268	93
I, 293	94
Vernon's Reports, I, 348, 411, 412, 475	107
II, 70, 291, 652, 764	107
Vesey's Reports, IX, 399	288
Viner's Abridgement, I, 280, pl. 13	157
IV, 53	189
XIX, 34, pl. 3	69
Nuisance, K. 2	232
Trespass, 456, 9	228
456 N. 1	227
457, 8, 13, 14	228
463, 2, 11	228
471, 15	229
533, 10	228
544, 7	228
 Wachter, Wechselrecht, 481	 280
482	271
Washburn, Real Property, 5th ed., 225, 226	176

	PAGE
Watkins, Descents, 4th ed., 4 n. (c)	177
West, Symboliography, § 521	213
White & Tudor, Leading Cases in Equity, 6th ed., 2, 23	254
Amer. ed., II, 214	317
Wilkins, Anglo-Saxon Laws, 218, 229, 304	42
Williams, Real Property, 13th ed., 162	243
Seisin, 7	172
Williston's Wald's Pollock on Contracts, 245	461
Williston in 8 Harv. Law Rev. 27	350
Wilson, Life of James I, 94, 95	445
Winch's Reports, 26	70
Wood, Institutes, 282	259
Yale Law Journal, May, 1909	453
Year Books: Edward I: 20 & 21, 139	89
174	189
181	99
189	71, 73
193	71, 72
213	79
255, 279	99
305	109
466	81
494, 496	98
21 & 22, 106	61, 66, 182
137	102, 211
375	99
505	95
515, 517	99
554	178
586	66, 69, 111
589	59
615	95
30 & 31, 35	220
172	220
282	222
283	221
376	220
424	65
508	173
509	52
512, 513	52, 53, 173
514	173
518, 520	43
526, 527	52, 53, 173
542	59
545	50
32 & 33, 54	61, 66, 182
82	66, 69, 182
319	57
33-35, 148	69, 182
150	89
239	77, 238, 239
41, 407	79
Edward II: 1, 41	60
3, 49	221

TABLE OF OTHER AUTHORITIES CITED.

531

Year Books: Edward II:

	PAGE
3, 78	71, 72
6, 177	222
6, 192	71, 72
7, 242	124
8, 270	71
11, 344	60
14, 409	172
16, 490	57, 58, 73, 74, 184
18, 599	222

Edward III:

1, 22, 11	57
2, 2, 5	60, 82, 184
2, 17, 19	65
3, 31 b, 1	105
4, 57, 71	98
5, 2, 5	58
5, 3, 11	62, 66, 182
5, 10, 35	178
5, 13, 2	221
5, 14, 5	178
5, 23, 12	178
5, 56, 81	64
5, 63, 106	109
7, 12, 2	89
7, 65, 67	98
8, 10, 30	52, 53, 173
8, 25, 20	175
9, 2, 4	230
9, 7, 16	222
9, 14, 19	65, 66
9, 36, 38	116
11 & 12, 503, 505	183, 225
517, 519	183, 225
587	91, 124, 151
12 & 13, 172	236
244	73, 77, 118
345	99
13, 169	99
14, 3	99
150	220
230	225
231	183
15, 153, 155	54
17, 2, 6	43
17, 55	73
45, 1	72
48, 14	123
18, 6, 19	73
13, 7	91, 124
20, 31	41, 48
35, 15	44
21, 7, 20	123
12, 2	71, 91
17, 22	435
23, 16	49, 54
34, 23	226, 227
22, 9, 37	73

		PAGE
Year Books: Edward III:	22, 16, 63	52
	24, 24, 1	105, 440
	41 a, 22	73, 74, 184
	25, 48	99
	29, 25, 26	91, 123
	38 b	73, 74, 75
	38, 1, 1	71
	33 b	221, 222
	39, 3, 4	78
	5 a	74
	17 a	74, 77, 239
	41, 3 b and 4 a, 8	116
	7, 16	123
	10, 5	118, 239
	13, 3	95
	30, 35	74
	42, 10, 32	65
	43, 2, 5	123
	6, 11	130
	11, 1	93
	21, 11	118
	29, 11	73, 184
	44, 14, 30	78, 82
	18, 12	228
	21, 23	91, 124
	22, 26	223
	25 b, 34	236
	27, 6	77
	33, 17	74
	41, 44	74
	44, 57	53
	45, 6, 15	114
	24, 30	104
	46, 3, 6	118
	4, 12	221, 222
	9, 4	116, 118
	19, 19	130
	47, 5, 11	226, 228
	19, 40	227
	23, 55	187
	48, 6, 10	227
	6, 11	124, 132
	6, 12	223
	20, 16	58
	29, 15	124
	49, 13, 6	71
	50, 16, 8	89
Year Books: Liber Assisarum:	17, 1	43
	22, 70	91, 125
	82	43
	94	130
	97	54
	26, 17	52, 53
	32	53
	27, 56	226
	64	173

7

Year Books: L

He

			PAGE
Year Books: Henry IV:	14,	23, 30	74, 78
		25, 32	68
		26, 33	93
		27, 37	74, 78
Henry V:	1,	3, 3	223
		11, 21	119, 239
	9,	3, 9	118
		14, 22	75, 79, 184
Henry VI:		14, 23	91, 124
	3,	4, 4	88
		19, 31	73, 82
		32, 24	221
		36, 33	89, 130, 139, 155
		38, 1	73, 74
		42, 13	91
		43, 20	72, 77, 239
	4,	14, 11	176
		17, 1	105
		17, 2	36
	7,	1, 3	139
		22, 3	72, 79
		31, 25	73
		35, 36	187
	8,	7, 15	113
		25, 13	111
		27, 17	69, 182
	9,	17, 9	72
		38, 13	77
		43, 21	223
		43 b	227
		53, 37	137
		58, 4	73, 75
		60 a, 8	77
		60, 10	83
		64, 17	79, 213
	10,	25, 16	58
	11,	5, 9	88
		9, 18	72
		18, 10	140
		35, 30	299
		55, 26	140
	14,	18, 58	140
	18,	1, 1	227, 228
		9 a, 7	77
		18, 10	141
		24, 1	141
		30 a, 2	227
		55, 26	141
	19,	5 a, 10	120
		6, 11	105
		10, 29	73, 74
		24, 47	140, 211
		28 b, 49	230
		32, 66	178
		41, 84	73, 99
		45, 94	227, 228

TABLE OF OTHER AUTHORITIES CITED.

535

		Page
Year Books: Henry VI:	19, 49, 5	130, 131
	56, 19	222
	65, 4	73
	65, 5	69, 183
	69 a, 14	120
20,	6 a, 16	91
	16, 2	72, 118, 120
	18, 8	69
	20, 15	177
	25, 11	140, 141
	28, 21	109
	34, 4	91, 130, 140, 141
	35, 4	77, 91, 140
21,	15, 29	59
	32	43
	36, 4	229
	55, 12	77, 91, 130, 140
22,	14-15, 23	232
	15, 26	182
	43, 28	140
	44, 28	91
	52, 24	110
27,	9, 1	104
28,	4, 19	187
31,	11, 6	54
	12, 1	67
	13	43
32,	12, 20	72
33,	2, 10	120
	5, 15	178
	25, 8	78
	26, 10	232
	26, 12	62, 63, 79, 82
	42, 19	223
	44, 7	83
	46, 30	230
	48 a, 32	329
34,	4, 12	142
	11, 21	178
	12, 23	89
	30, 14	230
	30, 15	213, 258
	43, 44	111
35,	2, 3	178
	29,	178
36,	9, 10, 5	119, 238, 239
37,	7, 12	230
	8, 18	77, 91, 93, 140
	9, 18	140
	13, 3	108, 213, 258
	14, 3	110
	35, 22	60, 220, 230
	35, 23	238
38,	5, 14	118
	27, 8	227
	29, 11	125

		Page
Year Books: Henry VI:	38, 29, 12	93
	39, 5, 7	78
	18, 23	175
	26, 36	238
	34, 44	124
	35, 47	69
	36, 1	78
	49, 18, 23	77
	1, 6, 13	95
	9, 18	68, 183
Edward IV:	2, 5, 9	83, 180
	12, 50	120
	15, 7	57, 59
	16, 8	70, 183, 185
	18, 12	230, 231
	25, 26	228
	4, 9, 11	78
	11, 16	53
	17, 14	105
	21, 16	113
	29, 8	43
	5, 4, 10	110
	7, 13	349
	64	228
	127 b	37
	7, 2, 2	435
	5, 14	228
	5, 15	113
	6, 16	223
	14, 5	52
	15, 2	91
	43, 9	53
	8, 4, 11	144, 248
	6, 5	59
	15, 16	227
	9, 34, 9	188
	35 b, 10	232
	39, 1	178
	46, 32	120
	53, 15	84
	11, 6, 10	130, 132, 137
	12, 8, 20	229
	9, 22	154, 439
	11, 2	75
	12	72
	13, 9	83, 84, 130
	13, 10	133
	14, 14	75
	13, 6, 2	63
	14, 6, 3	91
	15, 32, 14	91, 93
	16, 8, 5	349
	9, 7	141
	10, 3	91
	17, 1, 2	77, 91
	3, 2	442

TABLE OF OTHER AUTHORITIES CITED.

537

			PAGE
Year Books: Edward IV:	17,	4, 4	91
		8, 6	349
	18,	3, 15	230
		5, 30	91
		23, 5	84, 85, 119, 239
		29, 27	113
	19,	10, 18	91
	20,	2, 11	227
		3, 17	91, 93
		10, 9	125
	21,	3, 2	227
		10, 1	222, 223
		11, 2	223
		19, 21	78
		22, 2	88
		23, 6	143, 249
		30, 25	222, 223
		42 b, 5	120
		64 a, 35	67, 182
		74, 6	60, 61, 180
		80, 28	78
	22,	2, 6	93
		5, 16	229
		6, 18	110
		6, 22	75
		10, 29	215
		13, 37	228
		20, 47	125
		51, 8	109
Edward V:	1,	2, 2	119
		5, 12	72
Richard III:	1,	1, 2	72
	2,	12, 31	53
		14, 39	45
Henry VII:		15, 39	63, 120
	1,	14, 2	110
		15 b, 2	113
		22, 12	93
		31, 1	78
	2,	11, 9	133, 140
		12, 15	140, 141
	3,	12, 10	53
		14, 20	141
	4,	3, 6	227
		5, 1	54, 180
		6 b, 2	120
	5,	15, 5	190
	6,	7, 4	70, 183, 184
		8 b, 4	183
		9, 4	185, 188, 190
		11, 8	349
	7,	12, 2	95, 110
	9,	25, 12	175
	10,	4, 4	329
		7, 7	72
		7, 14	72, 75, 184

		PAGE
Year Books: Henry VII:	10, 27, 13	185, 188
	12, 22 b-24 b	125, 144
	13, 9, 4	228
	15, 11	60, 220, 229, 230
	14, 10, 20	43, 49
	12, 22	70, 182, 183
	15, 2, 3	213, 258
	12 a	286
	16, 2, 7	62
	3 a, 7	180
	15, 14	187
	20, 1, 1	58, 181
	4, 13	85
	8, 18	85, 89, 142
	9, 18	232
	10, 20	147
	21, 1, 1	64
	6, 4	91
	14, 23	65
	18, 30	128, 148, 239
	29, 4	71, 72, 196
	39, 49	180
	41, 66	130, 142, 143, 249
Henry VIII:	12, 11, 3	143
	14, 4, 5	256
	23 b	228
	28 a, 7	113
	31, 8	232
	19, 3, 15	119
	26, 6, 27	67, 182
	27, 5, 15	239
	8, 22	239
	13, 35	78
	14, 4	442
	21, 11	69
	22, 15	78
	24, 3	143
	25, 3	85, 94, 133, 144
Zeitschrift f. d. gesammte Handelsrecht, Vol. 22, p. 59, Vol. 23, p. 225 .		211
Zeitschrift für Vergleichende Rechtswissenschaft, 367		215

INDEX.

- ABBREVIATIO PLACITORUM**, 44.
description of, 29.
references to trespass in, 56.
citations from. See Table of Authorities.
- ABRIDGMENTS.**
description of, 33.
- ACCIDENT.**
killing by, 178 n. 10.
- ACCOMMODATION.**
specialty contract of, 112.
- ACCORD AND SATISFACTION.**
of specialty, 110-111.
in tort, 111.
- ACCOUNT.**
generally, 116-121.
against factor, 116, 159.
concurrent with assumpsit, 117.
against bailiff, 116, 159.
against receiver, 117-118.
analogy to trust, 119.
where money paid by mistake, 120.
by donor against donee for another's use, 120.
against collector of rents, 120.
against tortfeasor, 120.
relation to money had and received, 121.
a real contract, 122.
unjust enrichment in, 163.
- ACQUIESCENCE.**
defense to a specialty, 114.
- ACTION.**
right of. See Chose in action.
See Writs, Debt, Deceit, Detinue, Assumpsit, Indebitatus Assumpsit, Replevin, Trespass, Trover.
- ACTION ON THE CASE.**
against bailee, 83-84.
concurrent with assize of nuisance, 232.
development of common law through, 115, 442, 443, 449.
in bailment, 132, 133, 134.
- ADIRREÉ, CHOSE**, 80 n. 3, n. 4, 80-82.
- ADMINISTRATOR.**
origin of, 96.
of disseisee, 188.
of disseisor, 190.
- ADVANCES.**
protection of one making, on faith of legal title, 260.
- AGENT.**
right of undisclosed principal to sue on contracts made by, 453.
of undisclosed principal, right of, to exoneration, 459.
See Undisclosed Principal.
- AGISTER.**
replevin, 65.
- AGREEMENT.**
See Assumpsit, Contract.
- ALTERED BILL OF EXCHANGE.**
payment of, 279.
- ANEFANGSKLAGE**, 68.
- ANGLO-SAXON LAW.**
courts in, 35.
similarity to Salic Law, 41.
- ANIMALS.**
wild, liability for, 447.
- ANNUITY.**
how enforceable, 99.
- APPEAL.**
and indictment, 43.
compensatory, 48-49.
generally, 47-55.
in Anglo-Norman Law, 41.
ineffective remedy, 52-53.
none by bailor, 58.
by bailee, 57 n. 5.
punitory, 48-50.
recuperatory, 48, 50-54.
satisfaction in appeals, 47.
See Homicide, Rape, Arson, Robbery, Larceny, Battery, Mayhem, Imprisonment.
- ARSON**, 47.
in Anglo-Norman Law, 41-42.
- ASSIGNEE.**
mentioned in obligation could sue, 211, 212.
of contract may retain payment through contract obtained by fraud, etc., 277.
- ASSIGNMENT OF CONTRACT.**
nature of, 258.
- ASSIZE.**
See Novel Disseisin, Nuisance.

ASSIZE OF CLARENDON, 52.

institution of indictment created by, 52.

ASSUMPSIT.

origin of consideration in, 78 n. 2.
 history of, compared with trover, 87.
 bailees chargeable in, 72, 132-134.
 concurrent with debt, 89.
 on a wager, 92.
 contract late name for, 93 n. 4.
 distinguished from debt, 95.
 against executor, 95.
 concurrent with account, 117.
 express, generally, 129-148.
 tort gist of action in early law, 130-132.
 early use of term, 130-133.
 jealousy of equity as influencing, 143.
 damages in, 144-145.
 consideration not borrowed from equity, 147-148.
 implied, 149-166.
 necessity for an express promise, 149.
 conservatism of common law in, 149.
 essential in certain tort actions, 149.
 promise implied in fact, 149, 154, 155, 156, 159.
 "every contract executory imports . . . an assumpsit," 151.
 promise to pay a precedent debt, 157, 167.
 subsequent promise, 157.
 bailiff or factor chargeable in, 159-160.
 on bills and notes, 160.
 on a record, 160.
 in statutory or customary duty, 161-162.
 for money had and received a substitute for account, 163.
 summary of history of, 166.
 for use and occupation generally, 165, 167-171.
 for rent, 168.
 for money had and received is in substance a bill in equity, 272.

ASSUMPSIT, INDEBITATUS.
 damages in, 88 n. 2.
 amount of recovery, 88 n. 2.
 for chattel, 89.
 where no price fixed, 90.
 on wager, 92.
 origin of count for money had and received, 119.
 concurrent with debt, 119, 149-152, 170.
 money paid by mistake, 120.
 against tortfeasor, 120-121, 170.
 on quasi-contract, 120, 150, 160-165.
 origin and basis of, 144-147.
 primarily a new form of procedure, 146.
 subsequent promise to precedent debt, 150-151.
 advantages of, over debt, 153, 154.
 for statutory and customary duty, 161-162.

ASSUMPSIT, INDEBITATUS (continued).

for proceeds of a tort, 164, 165.
 for unjust enrichment, 163-165.
 for use and occupation, 165.
 for goods consumed, 165.
 for money paid, 165-166.
 for rent, 167, 168.
 work and labor, 170.
 See Contract, Debt, Assumpsit, Quasi-contract.

ATTORNEY, POWER OF.

assignments of choses in action, 213-214.
 assignment of dissee's interest by, 215.
 See Power of Attorney.

ATTORNMENT.

defined, 212.
 to connue of fine of reversion, 210 n. 3.

AUTHORSHIP.

legal, by professors of law, 364.

AVAL, 101.**AWARD.**

parol submission to, 158, 159.

BACON, FRANCIS.

on statute of uses, 241-242.

BAILIFF.

account against, 116, 159.
 liability in debt, 117.
 assumpsit, 159-160.

BAILMENT.

in Salic Law, 40.
 appeals by bailor or bailee, 57 n. 5, 58.
 trespass by bailor for a term or at will, 58.
 trespass by bailee against bailor and vice versa, 59.
 bailee who refuses to return chattel not a trespasser, 62.
 bailee in replevin, 65-66.
 detainee founded on, 71.
 right of bailor compared with that of *cestui que trust*, 75-76.
 action against bailee for misuse, 83-84.
 detainee for value of destroyed *res*, 84.
 case against bailee for destroying *res*, 84.
 detainee, 132.
 remedy in assumpsit, 132-134.
 negligent bailee a tortfeasor, 133.
 no action against the third hand, 73.
 bailee an actor, 133.
 action on the case, 133.
 assumpsit against bailee, 133-134.
 gratuitous, 133-134.
 analogy between tenant at will and bailee, 135, 136.
 trespass against vendee of or wrongful taker from bailee, 180.
 detainee against sub-bailee, 184.
 for a term, bailor cannot maintain trespass or trover, 190.

BAILMENT (*continued*).

- bailor and bailee as owners, 193.
- for life, 195.
- bailor's interest non-transferable, 210.
- release by bailor after assignment, 214 n. 3.
- assignment of bailor's interest, 214 n. 3.
- successive assignments by bailor, 214 n. 3.
- bill in equity by bailor, 234.
- detinue by bailor against bailee, 238.
- detinue by beneficiary in bailment, 238-239.
- right of bailor to product of property misappropriated by bailee, 414.

BANKRUPTCY.

- transfer of right of entry or action by, 175.
- disseisor of land in, 177-178.
- transfer of chose in action by, 188, 212.

BARGAIN AND SALE, 128, 247.

- rights of bargainee in equity, 78 n. 2.
- of a use, 148.
- See Uses.

BATTERY.

- in Anglo-Norman Law, 41.
- appeal of, 48, 210 n. 2.

BATTLE.

- trial by, 42, 48, 51, 53.

BEASTS.

- detention of domesticated, 62 n. 2, 182 n. 2.

BENEFICIARY.

- necessity of designation of, for charitable trust, 289.

BEQUEST.

- by disseisor, 190.
- of chattel adversely held, 187.

BIGELOW, M. M., 29.

BILATERAL CONTRACTS.

- consideration of, 340.
- promise and not obligation is consideration of, 344.

BILL OF EXCHANGE.

- assumpsit, 160.
- rights of successive parties on forged, 270 *et seq.*
- paid on faith of attached bill of lading, 276.
- payment of, altered, 279.
- effect of forgery of indorsement on right of holder to retain payment, 280.

BILL OF LADING.

- attached to forged bill of exchange, 276.

BILL SINGLE, 102.

BIRDS, 182 n. 2.

BLACKSTONE.

- implied contract, 132.
- on ownership, 193.
- replevin, 70.
- on prescription, 198.
- Statute of Westminster II, 443-444.

BONA FIDE HOLDER FOR VALUE.

- protected in equity, 115.

BONA FIDE PURCHASER.

- detinue against, 76.
- for value without notice, takes free from equities, 115.
- See Purchase.

BONA VACANTIA, 197 n. 1.

BOND.

- with a condition, 102.
- assignability of, 213 n. 2.

BONUM VACANS.

- of right of action, 188.

BRACTON.

- note book, description of, 29.
- treatise, description of, 31.
- trespass, 57.
- replevin, 64-65.
- chose adirrée, 80-81.
- remedy for stolen chattel, 81.
- assignees of covenant, 100.
- specialty, 104.
- contract, 123.
- quare ejecit infra terminum*, 222.

BRIAN, CHIEF JUSTICE.

- on replevin, 70.
- on detinue, 84.
- on deceit, 141.
- on nature of property, 218.
- "The thought of man shall not be tried," 435.

BRITTON.

- description of, 32.
- trespass, 57, 226.
- replevin, 64-66.
- lessor who ousts lessee, 222.
- novel disseisin and trespass, 226.

BROOKE, R.

- Abridgment, 33.
- on successive trespasses, 180.

BRUNNER, H., 211 n. 4.

CANCELLATION.

- of void instrument, purchase for value no defence to bill for, 266.

CARRIER, 134, 137, 154, 155, 161.

"CAUSA."

- as origin of consideration, 129, 147.

CESTUI QUE TRUST.

- defrauded, when barred from recovery, 257.
- how far an owner of land, 262.
- transfer of portion of interest of, 262.
- may grant rent charge, 263.
- necessary for trust, 286.
- right of, to follow property into its product, 412 *et seq.*

CHARITABLE TRUSTS.

- failure of, 285.

CHATTELS.

- created by severance from realty, 178-179.
- life tenancy in, 194, 195.

CHATELS (*continued*).

- purchase for value no defense against bill for surrender of, 266.
- actions. See Disseisin.

CHOSE ADIRREÉ, 80-83.**CHOSE IN ACTION.**

- disseisee's right a, 174-177.
- succession to, by death, 175.
- curtesy in, 176.
- dower in, 176.
- no execution on, 177.
- non-transferable, 185-187.
- assignable by or to king, 210.
- inalienability of, 210-218.
- suit by assignee if assigns named, 211, 212.
- personal nature of, 211, 212.
- release of, by assignor, 214.
- successive assignments of, 214.
- See Contract.

CHURCH COURTS.

- on *laesio fidei*, 124, 125, 126.

CIRCUTY OF ACTION.

- principle of avoiding may bring about novation, 301.
- avoidance of, 335.

CLARENDON.

- assize of, 52.
- constitutions of, 125.

CLOUD ON TITLE. See Title.**COKE, LORD.**

- on covenant of warranty, 100.
- assignments of chose in action, 211.

COMMON.

- disseisor entitled to, 178.

COMMON COUNTS.

- origin of, 153-154.
- See Indebitatus Assumpsit.

COMMON PLEAS.

- court of, 37.

CONDITION.

- entry for condition broken, 236.

CONSIDERATION.

- origin of, 78 n. 2, 147.
- failure of, in specialty, 108-109.
- early forms of, 129-130.
- detriment, 129-130.
- precedent debt, 129-130.
- three kinds of, 146.
- term not necessary in action of debt, 147 n. 2.
- not borrowed from equity, 147-148.
- executed, 156, 157.
- moral, 199 n. 1.
- two theories of, 323 *et seq.*
- forbearance to prosecute groundless claim as, 325.
- forbearance to prosecute *bona fide* claim as, 326.
- performance of official duty as, 327 n. 1.
- performance of pre-existing contractual duty as, 327, 329, 340, 348.
- part payment as, 329.

CONSIDERATION (*continued*).

- composition with creditors as, 334.
- temporary forbearance as, 336.
- promise to complete performance as, 337.
- promise to commit or abstain from crime or tort as, 340 n. 1.
- whether detriment, 342.
- promise and not obligation, 344.
- in contracts of wager, 345.
- in novation, 346.
- adequacy of, immaterial, 351.
- See Contract, Assumpsit, Indebitatus Assumpsit.

CONSTITUTIONS OF CLARENDON, 125.**CONSTRUCTIVE TRUST.**

- principle on which based, 255.
- where title is obtained by murder, 314.
- in product of misappropriated property, 412 *et seq.*
- based on breach of express oral trust of land, 425 *et seq.*

CONSTRUCTIVE TRUSTEE.

- sale by, without conveying title, 261.

CONTRACT.

- in Salic Law, 40.
- not to sue on specialty, 114.
- simple, prior to assumpsit, 122-128.
- in Year Books, 123 n. 3.
- every contract executory imports an assumpsit, 151.
- specific performance, 248-250.
- specific performance in Roman Law, 248.
- specific performance of. See Specific Performance.
- implied, basis of, 255.
- a purely personal relation, 258.
- assignee of, how far protected against payment to assignor, 259.
- tainted by illegality, innocent assignee of, may retain payment, 278.
- novation in, 298 *et seq.*
- unilateral, consideration for, 323 *et seq.*
- value of, may be destroyed by public policy, 324.
- requirement of mutuality in, 370 *et seq.*
- to sell land, analogy to mortgage, 381.
- enforcement of, by or against stranger, 381 *et seq.*
- by agent of undisclosed principal, 453.
- See Assumpsit.
- assignee of. See Assignee.
- consideration of. See Consideration.
- substitution of parties in. See Novation.
- implied in fact, 438-440.

COUNTY.

- in Anglo-Saxon times, 35.
- after Norman conquest, 35.

COUNTY COURTS, 37-38.
after Norman Conquest, 35.
in Anglo-Saxon times, 35.

COURTS.

Frankish, 34.
Salic, 34.
Anglo-Saxon, 35.
Norman, 35.
Baron, 35, 36.
Leet, 37.
county, 37-38.
of common pleas, 37.
after Norman conquest, 37.

COVENANT.

in Germanic Law, 97.
generally, 97-103.
liability in, when seal stolen, 98.
to stand seised, 98, 147, 148 n.
suit by heir, 99.
suit by executor, 99.
of warranty, extent of, 99-100.
of warranty, Coke on, 100.
running with the land, 100-102.
of warranty, liability of warrantor,
100-102.
payable to bearer, 102-103.
loss of the obligation, 105 and n. 2.
accord and satisfaction in, 110-111.
equivalent to agreement, 139 n. 3.
relation to debt, 152, 153.
by lessee against lessor, 222.
failure of consideration, 440-441.
loss of specialty in equity, 440.
enforcement of restrictive, for and
against strangers, 384.
See Specialty.

CRABBE, G.

History of English Law, 33.

CREDITORS.

agreement of, to compromise with
debtor, 334.
substitution of, by novation, 302.

CRIME.

effect of acquisition of title by, 310
et seq.
promise to commit or abstain from, as
consideration, 340 n. 1.

CURIA DUCIS, 37.

CURIA REGIS, 37.

CURTESY.

in right of entry or of action, 176.
by husband of disseisor of land, 178.

CUSTOM OF MERCHANTS, 160.

CY PRES.

doctrine of, 287.

DAMAGES.

in contract, 144-145.

DEATH.

extinguishment of disseisee's right by,
197.

DEBT.

in popular courts, 37.

DEBT (*continued*).

a grant, 78, 150-151, 241.
generally, 88.
quid pro quo, 88, 91, 92, 93.
on a record, 88, 90.
on a specialty, 88, 90, 95, 122.
amount of recovery, 88 n. 2.
against lessee, 89.
distinguished from detinue, 89.
obligation for definite amount, 89.
judgment in, 89.
for breach of agreement to deliver
chattel, 89.
employee against employer, 89.
against mainpernor, 90.
by vendor without delivery, 91.
by vendor not owner, 91.
for giving woman in marriage, 91.
on forbearance to sue, 92.
quasi-contract, 92.
on a release, 92.
for rent, 92, 96.
none on mutual promises, 92, 95.
for quasi-contractual obligation, 92.
for benefit conferred on third person,

93-94.

distinguished from assumpsit, 92, 95.
executor of debtor, 95.
against executor, 95 n. 5.
bailiff liable in, 117.
against receiver, 118-119.
concurrent with indebitatus assumpsit,
119, 170.
for parol undertaking, 122.
on contract, 88, 90, 123-124.
indebitatus assumpsit concurrent with,
149.

on covenant, 152.
alternative to covenant, 152, 153.
for statutory or customary duty, 161.
concurrent with account, 163.
unjust enrichment, 163.
on lease for years, 167.
for goods sold, 167-168.
concurrent with assumpsit, 168.
not assignable, 210.
part payment, whether consideration
for discharge of, 329.
compromise of, by creditors' agree-
ment, 334.
of partnership, contract by new firm to
pay, 301.

DEBTORS.

substitution of, by novation, 299 *et seq.*

DECEIT, 37.

warranty, 136.
relation to contract, 139-143.
breach of promise as, 140-145.
survival of action of, 210 n. 2.

DEFENSE.

to contract, payment to assignee in
ignorance of, gives no right to re-
cover the amount paid, 278.

DEPOSIT.

right to hold where misappropriated funds form part of, 420.

DETINUE.

in popular courts, 37.

generally, 71-79.

an action *ex contractu*, 71-73, 184.

founded on bailment, 71, 132.

against husband and wife, 71.

against married woman, 71.

against another than bailee, 73-75.

against executor of bailee, 73 n. 6.

against successor of prior, 73 n. 6.

against widow of bailee, 73 n. 6.

against *bona fide* purchaser, 76.

by third person against bailee, 77.

against vendor, 77, 184, 239.

a real contract, 78, 122.

based on grant, 78, 122.

for estrays, 78.

where no bailment, 78-79.

against finder, 78 n. 3, 79, 82.

by grantee against bailee of grantor, 79.

by heir, 79.

for charters, 79-80.

relation to trover, 82, 85.

trover concurrent with, 85-86.

wager of law, 86 n. 7, 132.

distinguished from debt, 89.

for goods delivered for use of third person, 118.

defects of, 132.

against bailee, 184, 238.

against sub-bailee, 184.

against those in privity with bailee, 184.

by disseisin, 190.

against a trespasser, 195.

against bailee for life, 195.

effect of judgment in, 207.

by bailor against bailee, 238.

by beneficiary in bailment, 238.

See Bailment.

DETRIMENT.

how far consideration must be, 323.

consideration as, 342.

what is, 342.

DEVISE.

of right of entry or of action, 175.

by disseisor of land, 177.

DIALOGUS DE SCACCARIO, 31.**DISCOVERY.**

purchase for value as defense to bill for, 253.

bill for, not allowed against *bona fide* purchaser, 265.

DISPARAGEMENT.

of goods, 443.

DISSEISEE.

position of, 179, 181-182.

how may acquire possession, 196.

extinguishment of right of, by release, marriage, death, lapse of time, 196-207.

DISSEISEE (continued).

assignability of right of, 210, 215-218.

of land, position of, in detail, 174-177.

fine levied by, 209.

DISSEISIN.

assize of novel, against second disseisor, 60-61.

change of property by, 172-173, 173 n. 2.

defined, 180.

analogy between land and chattels, 185-191.

a principle of property, not feudal, 192.

disseisor has assize of novel disseisin against disseisee, 221 n. 2.

disseisee may bring trespass, 229-230.

disseisee has trespass against disseisor, 230.

DISSEISIN OF CHATTELS.

generally, 172-191.

nature of right of, 179, 181.

husband's right when wife disseised, 189.

DISSEISOR.

as owner, 177-178, 193.

DISSEISOR OF CHATTELS.

position of, in detail, 189-190, 192.

rights against stranger, 190.

DISSEISOR OF LAND.

remedies against, 183 n. 2.

transfer by, 177.

right to sue, 177.

position of, 177, 178.

DISTRAINT.

by disseisor of land, 178.

See Replevin.

DOCTOR AND STUDENT, 32, 240.**DOG.**

bequest for, 294.

liability for bite of, 447.

DOWER.

in right of entry or of action, 176.

by wife of disseisor of land, 178.

purchase for value, no protection against bill for assignment of, 266.

DRAWEE.

whether negligent in paying forged bill, 271.

DURESS.

defense to specialty, 113-114.

by payee of note, 114.

whether distinguished from fraud, 260.

owner of equitable obligation induced by, to convey, 264.

DUTY.

performance of contractual, as consideration, 327, 329, 340, 348.

ECCLESIASTICAL COURTS.

uses in, 235-236.

EJECTMENT.

origin of, 222 n. 6.

See Writs.

EMPLOYEE.

action of, in preventing employment of another whether actionable, 406.

ENRICHMENT.

prevented on failure of legacy, 290.

ENTRY, RIGHT OF.

in detail, 174-177.
non-assignable, 174.
devisable, 175.
succession by death, 175.
curtesy in, 176.
dower in, 176.
no executor on, 177.
toll of, in old law, 178 n. 9.
in disseisin, 219.

EQUITABLE DEFENSES, 104-115, 440.

EQUITABLE EXECUTION.

against principal, 459, 461.
against trustee, 460.

EQUITABLE MORTGAGES.

protection of, 261.
See Mortgage.

EQUITABLE OBLIGATIONS.

basis of, 255.

EQUITIES.

protection against latent, 260.
conflicting, 261.
legal title prevails in case of equal, 272.
equal, 283.

EQUITY.

trover as substitute for, 87.
equitable defenses, 104-115.
specialty, loss of, 105.
lost obligations, 105 n. 2.
fraud, 106-107, 234, 444-445.
specialty, fraud in, 106-107.
specialty, illegality, 107-108.
acts *in personam*, 108, 233-234.
specialty, failure of consideration, 108-109.
specialty, payment, 109-110.
specialty, debt, accord and satisfaction of, 111.
specialty, contract of accommodation, 112.
specialty, defenses of surety, 112.
specialty, agreement not to sue on, 114.
acquiescence defense to a specialty, 114.
parol agreements, 125, 126, 127, 128.
gratuitous undertaking, 125 n. 3, 240, 241, 242, 249.
gratuitous declaration of a trust, 125 n. 3.
rent, 127.
annuity, 127.
relief to tailors and the like, and sureties, 156, and n. 1 and n. 3.
bailment, 234.
unjust enrichment, 234-235.
origin of jurisdiction in uses, 237.
recognition of second use, 244, 246.

EQUITY (continued).

specific performance, 248.
specific performance in Roman law, 248.
reimbursement for expense incurred at request, 248-249.
relief in, against *bona fide* purchaser, 253 *et seq.*
Lord Westbury's distinction between, and equitable estate, 253.
enforcement of contract by, 370 *et seq.*
lost obligation, 440.
acts *in personam*, 444.
bills for specific performance, 444.
bills for restitution, 444.
mortgage, 445.

ESCHEAT, 176, 177, 197.

ESCROW.

delivery in, 214 n. 1.

ESTATE.

equitable, Lord Westbury's distinction between "equity" and, 253.

ESTOPPEL.

title acquired by, 195.
equitable, 256 n. 260.
how far principle of priority modified by, 261.

ESTRAY, 52, 58, 62, 78, 80.

EXCHANGE.

bill of. See Bill of Exchange.

EXCHEQUER.

Court of, 37.

EXECUTION.

in popular courts, 36.
against disseisee of land, 177.
none on right of entry or of action, 177.
against disseisee of chattel, 189, 190.
equitable. See Equitable Execution.

EXECUTOR, 95.

debt against, 95 n. 5.
of disseisor, 190.

EXONERATION.

right of agent to, 459.
of trustee to, 460.

EX TURPI CAUSA NON ORITUR ACTIO, 320.

EYRE.

justices in, 37.

FACTOR.

account against, 116, 159.
has title, 116-117.
del credere, not within Statute of Frauds, 117.
in nature of trustee, 117.
pledgee from, 117.
assumpsit, 159, 160.

FESTUCA, 97.

FINCH, HENRY.

trespass, 172.

FINDER.

as owner, 193.

FINE.

levied by disseisee, 209.

- FITZHERBERT, A.**
 abridgment, description of, 33.
 disseisin of chattels, 172.
 uses, 238.
- FLETA.**
 description of, 32.
 trespass, 57.
 replevin, 64.
 debt, 90.
 parol contracts, 123.
 contract, 123.
- FOLLOWING MISAPPROPRIATED PROPERTY INTO ITS PRODUCT, 412 *et seq.***
- FORBEARANCE TO PROSECUTE.**
 groundless claim as consideration for contract, 325.
 temporary, as consideration, 336.
- FORECLOSURE.**
bona fide purchaser cannot prevent, 266.
- FORFEITURE FOR FELONY.**
 by disseisor of chattel, 189.
- FORGED TRANSFERS OF STOCK, 393 *et seq.***
- FORGERY, 37.**
 of bill or note, effect on rights of successive parties, 270 *et seq.*
- FRANKISH COURTS, 34.**
- FRAUD.**
 in specialty contracts, 106-107.
 in equity, 234.
 purchase for value as defense to bill for, 253.
 owner of equitable obligation induced by, to convey, 264.
 assignee of contract obtained by, may retain payment, 278.
 preventing making or repudiation of will, 315.
 title obtained as result of, 317.
 in equity, 444-445.
- FREEHOLD.**
 disseisin of, 219, 224.
 as a basis for trespass, 226.
- GERMANIC LAW.**
 covenant in, 97-98.
- GLANVIL.**
 Tractatus, description of, 31.
 replevin, 65.
 contract, 123-124.
- GOODS SOLD.**
 debt for, 107.
 assumpsit for, 168.
 conversion, 170.
 See Assumpsit, Debt.
- GUARANTY, 95, 142, 143.**
- GUARDIAN, 225 n. 5.**
 right of wads to product of property misappropriated by, 414.
- HALE, M.**
 History of the Common Law, 32.
- HARVARD LAW SCHOOL, 359.**
- HEIR.**
 of disseisee, 175.
 of disseisor, 177.
- HENGHAM.**
 Magna, 32.
 Minor, 32.
- HENRY II.**
 introduced indictment, 42.
- HOLDER OF FORGED BILL.**
 right of, to retain payment, 272.
- HOLMES, O. W., 79 n. 4, 124, 143 n. 3.**
- debt, 90.
 covenant of warranty, 100.
 fraud and duress in contract, 113.
 contract prior to assumpsit, 122, 124.
 equity jurisdiction in parol agreements, 125.
 use of, and assigns in covenant, 211 n. 4.
 origin of uses, 233.
- HOMICIDE, 41-42, 47, 48, 49.**
- HONORARY TRUST, 294.**
- HORSE.**
 bequest for, 294.
- HUE AND CRY, 40, 50, 61 n. 4.**
- HUNDRED, 35.**
- HUSBAND AND WIFE.**
 wife disseised, 176.
 husband's right to wife's chose in action, 189.
 loss of consortium, 443.
- ILLEGALITY.**
 in specialty, 107-108.
- IMPLIED CONTRACTS. See Contracts, implied.**
- IMPRISONMENT.**
 in Anglo-Norman Law, 41.
 remedies for, in Bracton's time, 44.
 appeal of, did not survive, 210 n. 2.
- INCUMBRANCE.**
 purchase for value as defense to bill for removal of, 253.
- INDICTMENT.**
 introduced by Henry II, 42.
 concurrent with private action, 43.
 relation to appeal, 48-49.
 conditional on laches of appellor, 54.
- INDORSEMENT.**
 effect of forgery of, on right of holder of bill to retain payment, 280.
- INNKEEPER, 134, 137, 154, 156, 157 n. 7, 158 n. 1, 159, 161.**
 agreement to indemnify, 324 n. 1.
- INNS OF COURT.**
 training of lawyers in, 355.
- INSANE PERSON, 437-438.**
- INSURANCE.**
 by disseisor of land, 178.
- JOINT TORTFEASORS, 208-209 and note 1.**
- JUDGMENT.**
 merger of claim in, 207.
 as passing title, 207-208.

- JUDGMENT (*continued*).
 against one of several tortfeasors, 208-209.
 unsatisfied, no bar against second tortfeasor, 208 n. 2-209.
 purchase for value no defense to bill to have satisfied on record, 266.
- JURY.
 petty, in place of ordeal, 43.
 in trespass, 44.
 in appeal of imprisonment, 48.
 in appeal of mayhem, 48.
 in appeal of robbery or larceny, 51.
- KEENER.
 on Quasi-Contracts cited, 270 n. 2.
- KELHAM.
 Norman-French Dictionary, 33.
- KING.
 right of, to right of action as *bonum vacans*, 188.
 could be assignee of chose in action, 210.
 no remedy against grantee of king who disseises, 220.
- KING'S BENCH.
 Court of, 37.
- KING'S COURT.
 procedure in, 57.
- LADING, BILL OF, see Bill of Lading.
- LÆSIO FIDEI.
 jurisdiction of church, 124-127.
- LAND.
 enforcement of contract to convey, for and against a stranger, 381 *et seq.*
 constructive trust on breach of express oral trust of, 425 *et seq.*
- LANDLORD.
 cannot have replevin, 66.
 as owner, 193.
 trespass by, 228-229.
- LANGDELL, C. C., 233.
 life of, 467 *et seq.*
 discussion of doctrine of purchase for value by, 254.
- LARCENY.
 in County Court, 38.
 in Salic Law, 39, 52.
 Anglo-Norman Law, 41-42.
 remedies for, in Bracton's time, 44.
 title acquired by thief, 173.
animus furandi, 178 n. 10.
 appeal of, of Salic origin, 39, 52.
 appeal of, 47-48.
 appeal of, procedure in, 50-54.
 appeal of, *secta*, 54.
 appeal of, restitution, 54-55, 178.
 appeal of, Jurisdictional Circuit in, 57.
 appeal of, by servant, 598 n. 1.
 appeal of, comparison with novel disseisin, 60.
 appeal of, for chattel found, 80.
 appeal of, survival, 210 n. 2.
- LAW AND MORALS, 435.
- LAW PROFESSOR.
 vocation of, 354 *et seq.*
- LAW SCHOOLS.
 in the United States, 359.
- LAWYER.
 training of, in England, 355.
- LEASE FOR YEARS.
 See Rent, Landlord, Termor, 167, 168.
- LEGAL EDUCATION.
 history of, 354 *et seq.*
- LEGAL TITLE. See Title.
- LEGISLATION.
 influence of law professor on, 367.
- LESSEE FOR VALUE PROTECTED, 256.
 See Termor.
- LESSOR.
 cannot have replevin, 66.
 as owner, 193.
 trespass by, 228-229.
- LIBER INTRATIONUM, 83.
- LIEN, 157, 158.
 purchaser for value may hold against, 257.
- LIFE TENANCY.
 in chattel, 194, 195.
- LITERARUM OBLIGATIO, 115 n. 2.
- LITTLETON.
 Tenures, 32.
- LOSER.
 as owner, 193.
- LUNATIC, 437-438.
- MAGNA CARTA, 38.
 "MAINOUR," 50, 50 n. 1, 55 n. 2, 53.
- MAINFERNOR.
 charged by parol, 90.
- MAINTENANCE, 213, 213 n. 3, 215.
 whether assignment of right is, 258.
- MAITLAND, F. W., 172.
- MALICIOUS PROSECUTION, 442.
- MARKET.
 purchase at, as a defense to appeal of robbery or larceny, 51.
- MARKET OVERT, 55, 76, 91.
- MARRIAGE. See Husband and Wife.
 as extinguishment of disseisee's right, 196.
- MASSÉS.
 bequest for, 294.
- MASTER.
 liability for tort of servant, 447.
- MAYHEM, 37, 41, 43 n. 2, 44, 49, 210 n. 2.
- MERCHANT.
 statute, 102, 213 n. 2.
- MERGE.
 judgment, 207.
- MIRROR OF JUSTICES.
 on trespass, 57.
 replevin, 64-65.
- MISAPPROPRIATED PROPERTY. See Property.
- MISERICORDIA, 60-61.

- MISFEASANCE.**
and nonfeasance, 133, 142, 450, 452.
- MISSI**, 37, 42.
- MISTAKE.**
account allowed where money paid by mistake, 120.
purchase for value as defense to bill for, 253.
- MONEY HAD AND RECEIVED**, 119, 121.
- MONUMENT.**
bequest for, 295.
- MORALS.**
law and, 435.
- MORTGAGE.**
equitable without notice of prior incumbrance, 256.
payment to innocent assignee of, in ignorance of prior assignment, 278.
in equity, 445.
- MORTGAGEE.**
whether legal or equitable may foreclose against *bona fide* purchaser, 266.
right of junior, to tuck first and junior mortgages, 267-269.
- MOTIVE.**
wrongful, how far act may be tort because of, 399 *et seq.*
- MURDER**, 41, 47.
inheritance by murderer, 448-449.
- MURDERER.**
cannot keep title acquired by crime, 310 *et seq.*
- MUTUALITY.**
in specific performance, 370 *et seq.*
- NATURA BREVIIUM.**
Fitzherbert's, 32.
old, 32.
- NECESSITY.**
way of, 199 n. 2.
- NEGLIGENCE**, 436-437.
- NONFEASANCE.**
liability for, 133, 142, 450-452.
- NORMAN COURTS**, 35.
- NORMAN LAW.**
similarity to Salic Law, 40-41.
- NOTE, PROMISSORY.** See Bill of Exchange.
- NOTICE.**
purchase for value without, 253 *et seq.*
See Purchase.
constructive, meaning of, 255 n. 1.
- NOVÆ NARRATIONES**, 81-83.
- NOVATION**, 298 *et seq.*
defined, 212.
analysis of nature of, 213 n. 1.
consideration in, 346.
- NOVEL DISSEISIN.**
assize of, 60-61, 219-226, 225 n. 1.
- NUISANCE.**
abatement of, by act of party must be speedy, 178 n. 9.
assize of, 231-232, 231 n. 5.
- OBLIGATION.**
impossibility of substitution of parties in, 258.
equitable. See Equitable Obligation.
- OFFICIAL DUTY.**
promise in consideration of performance of, 327 n. 1.
- OLD NATURA BREVIIUM**, 32.
- OLD TENURES**, 32.
- ORAL TRUST.** See Trust.
- ORDEAL**, 42, 43, 48.
- OUTLAWRY.**
of disseisee, 176 n. 1.
- OWNER.**
who is an, 193.
- OWNERSHIP.**
nature of, in general, 192-209.
relation of possession and right of possession to, 193-209.
nature of, in title by occupation, 194.
nature of, in title by derivation, 194.
- PARENT AND CHILD.**
father not liable for son's debt, 94 n. 6.
- PARTIES.**
substitution of, in contract, see Novation.
- PARTITION.**
bill for, maintainable against *bona fide* purchaser, 266.
- PARTNERSHIP.**
contract by successor to pay debts of, 301.
- PAYMENT.**
of part, whether consideration for discharge of debt, 329.
- PERPETUATION OF TESTIMONY.** See Testimony.
- PLACITA ANGLO-NORMANNICA.**
description of, 29.
- PLEAS OF THE CROWN.**
for the County of Gloucester, 30.
- PLEDGE**, 58, 97, 98, 117, 214 n. 3.
- PLEDGEE PROTECTED**, 256.
- POLLOCK AND MAITLAND.**
History of English Law, 33.
- POPULAR COURTS.**
jurisdiction in minor injuries, 41.
- POSSESSION.**
synonymous with seisin, 172.
right of, relation to ownership, 193-209.
sufficient for trespass, 227-228.
actual, necessary for trespass, 228.
constructive, when sufficient for trespass, 229.
- POWER.**
protection of irrevocable, 257.
- POWER OF ATTORNEY.**
to enforce contract, 258.
- PRÆCIPE QUOD REDDAT.**
in debt, 88.

- PRESCRIPTION.**
 title by, 197-207.
 analysis of effect of, on title, 198-207.
 does not destroy remedy merely, 198-207.
 tacking, 203-207.
- PRICE v. NEAL.**
 doctrine of, 270 *et seq.*
 doctrine of, as to forged transfers of stock, 393.
- PRINCIPAL.**
 undisclosed. See Undisclosed Principal.
- PRIORITY.**
 determines conflicting equities, 261.
- PRIVACY.**
 right to, 449.
- PRIVITY.**
 in money had and received, 119.
- PROCEDURE.**
 in King's Courts, 57.
- PRODUCT.**
 of misappropriated property, following, 412 *et seq.*
- PROFESSOR OF LAW.**
 vocation of, 354 *et seq.*
- PROMISE.**
 implied in fact, 149, 150, 154, 159, 169 n. 5.
 when enforceable, 324.
 attempt to determine value of, 352.
- PROMISSORY NOTE.** See Bill of Exchange.
- PROPERTY.**
 changed by tort, 172-173.
 in chattel completely divested by disseisin, 180.
 judgment passing, 207-208.
 of *cestui que trust*, nature of, 262.
 following misappropriated, into its product, 412 *et seq.*
- PUBLIC POLICY.**
 may destroy value of contract, 324.
- PURCHASER FOR VALUE.**
 warranty, 101.
 duress, 114.
 without notice, 253 *et seq.*
 where legal title has been bought, 255.
 no protection against most claims, 266.
- QUANTUM MERUIT**, 154, 155, 156.
 on promise implied in fact, 169 n. 5.
- QUASI-CONTRACT.**
 debt on, 92.
 indebitatus assumpsit, 150.
 foundation of, 160.
 generally, 160-165.
 statutory or customary duty, 161-162.
 money paid under a reversed judgment, 163 n. 4.
 money obtained by hand a trespass or conversion, 170.
 basis of, 255.
- QUID PRO QUO**, 90-91, 93, 123 n. 3, 139 n. 4, 140 n. 3, 147.
 See Debt.
- RAPE**, 47, 48.
 in Anglo-Norman Law, 41-42.
- REALTY.**
 severance from, 178-179.
 See Disseisin, Trespass.
- RECAPTION.**
 right of, 178.
- RECEIVER.**
 account against, 117-118.
 debt against, 118-119.
- REEVE.**
 History of English Law, 32.
- REGISTRUM OMNIUM BREVIUM**, 32.
- RELEASE.**
 of warranties, 101.
 by disseisee to disseisor, 175 n. 1, 177.
 as extinguishment of disseisee's right, 196.
 of all actions, effect on right of entry, 201 n. 2.
- REMAINDER.**
 transferable by fine, 210.
- RENT.**
 assumpsit for, 167-169, 170.
 on lease for years, 167, 168.
- RENT CHARGE.**
 how enforceable, 99.
cestui que trust may grant, 263.
- REPLEVIN.**
 for wrongful distress, 60-61.
 claim of landlord to ownership of goods, 61.
 generally, 64-70.
 in manorial court, 65.
 lessor for a term cannot have, 66.
 effect of claim of property by defendant, 66-67.
 plea of property in stranger, 69.
 for any wrongful taking, 69-70.
 for wrongful detention, 70 n. 6.
 concurrent with trespass, 86, 183.
 trover concurrent with, 86.
 by disseisor against disseisee, 178-199.
 and trespass mutually exclusive, 181.
 history of, 181-183.
 against vendee or bailee of trespasser or second trespasser, 184.
 by disseisor, 180-190.
 effect of judgment on title, 207.
- REPUGNANCY.**
 in uses, 244 and n. 5.
- RESTITUTIO IN INTEGRUM.**
 in case of conveyance on invalid trust, 427.
- REVERSION.**
 transferable by fine, 210.
- ROBBERY.**
 in Anglo-Norman Law, 41-42.
 in Bracton's time, 44.

ROBBERY (*continued*).

- appeal of, 47-48.
- appeal of, procedure in, 50-54.
- appeal of, Salic origin, 52.
- appeal of, *secta*, 54.
- appeal of, end of, 55.
- appeal of, comparison with novel disseisin, 60.
- appeal of, did not survive, 210 n. 2.
- appeal of, in connection with disseisin of land, 220.
- appeal of, contracted with novel disseisin, 220-221.

ROTULI CURIE REGIS.

- description of, 29.

SALIC LAW, 34.

- finis, 39.
- recovery of stolen property, 39.
- bailment, 40.
- contracts, 40.
- theft, 40.
- compensation or restitution, 47.
- Salic origin of appeal of robbery or larceny, 52.

SALMAN, 235-237.**SANCTUARY**, 52.**SEAL.**

- necessity for, in covenant, 98.
- stolen seal, 98.

SECTA, 54, 80.**SEISIN.**

- synonymous with possession, 172.
- where lease of land for a term, 190.
- See Possession.

SELDEN SOCIETY PUBLICATIONS, 30.**SELF-DEFENSE.**

- no defense, 435-436.

SELF-REDESS, 219.**SERVANT.**

- trespass by, 58.
- appeal of larceny by, 59 n. 1.

SEVERANCE.

- from realty, chattel created by, 178-179.

SHARES IN COMPANY.

- protection of transferee of, 258.

SLADE'S CASE, 145-146, 149-151, 167, 170.**SLANDER**, 442.

- by judge, 448.

SLAVE.

- bequest for emancipation of, 296.

SORCERY.

- in Anglo-Norman Law, 41.

SOURCES, 29.**SPECIALTY.**

- generally, 104-115.
- contract itself, 104.
- loss of, 104-105.
- fraud, 106-107.
- illegality, 107-108.
- failure of consideration, 108-109.
- payment, 109-110.

SPECIALTY (*continued*).

- accord and satisfaction, 110-111.
- contract of accommodation, 112.
- duress, 113-114.
- equitable defenses at law, 114-115.
- agreement not to sue, 114.
- acquiescence as a defense, 114.

SPECIFIC PERFORMANCE.

- in Roman Law, 248.
- of contracts, 248-250.
- of contract, mutuality in, 370 *et seq.*
- for and against strangers to the contract, 381 *et seq.*

SPENCE, G.

- on assignments of choses in action, 211 n. 6.

SPIKE FENCE, 449.**STAPLE**, 102.**STATHAM, N.**

- Abridgment, 33.

STATUTE OF FRAUDS.

- guaranty under, 95.
- del credere* factor, 117.
- constructive trust where express trust prevented by, 425 *et seq.*

STATUTE OF LIMITATIONS.

- effect of repeal of, 200.
- effect of new promise on, 199 n. 1.
- See Prescription.

STATUTE OF WESTMINSTER II.

- action on the case created by, 442-443.

STATUTE MERCHANT, 102.**STATUTE STAPLE**, 102.**STATUTES.**

- modern, 33.

STIPULATIO, 104.**STOCK.**

- forgery of indorsement on certificate of, 281.
- forged transfers of, 393 *et seq.*

STORY, J.

- sale by dispossessed owner, 217.

STUBBS, W.

- Select Charters, 33.

SUBSTITUTION.

- of parties in a contract, see Novation.
- SUB-TRUST, 263, 264.

SUCCESSION.

- disseisin of land, 177.
- to disseisor, 190.

SURETY.

- in Germanic Law, 97-98.
- specialty contract of, 112.
- discharge of surety by giving time, 112.
- found without specialty, 122.
- implied contract of indemnity, 155.

SURVIVAL.

- of actions, 210, 210 n. 2.

TABULA IN NAUFRAGIO.

- doctrine of, 253, 254, 267.

- TACKING.**
 in title by prescription, 203-207.
 of mortgages, 260 n. 7, 267.
 an obnoxious principle, 264 n. 4.
- TALIONIS, LEX, 47-48.**
- TEACHING OF LAW.**
 as profession, 360.
- TENANT AT SUFFERANCE.**
 trespass by, 227.
- TENANT AT WILL.**
 analogy to bailee, 135-136.
 liability for fire, 135-136.
 permissive waste, 135-136.
 trespass by, 227.
- TERM.**
 setting up outstanding, satisfied, in bar to ejectment, 265.
- TERMOR.**
 remedies against landlord, 221.
 remedies against a stranger, 221-223.
 trespass by, 226.
 assize of nuisance by, 231-232, 231 n. 5.
- TESTIMONY.**
 purchase for value no defense to bill for perpetuation of, 266.
- THAYER, JAMES BRADLEY, 464.**
- THEFT.**
 See Larceny.
- THORPE'S ANCIENT LAWS, 33.**
- TILDEN TRUST.**
 failure of, 285 *et seq.*
- TITHES.**
 bill for account of, maintainable against innocent purchaser, 266.
- TITLE.**
 purchase for value no defense to bill for removal of cloud on, 266.
 legal, prevails in case of equal equities, 272.
 acquired by murder, 310 *et seq.*
 See Property.
- TITLE DEEDS.**
 purchase for value as defense to bill for surrender of, 253.
 pledge of, protected, 256.
 purchase for value defense to bill for surrender of, 266.
- TORT.**
 before Bracton, 39-40.
 accord and satisfaction in, 111.
 promise to commit or abstain from, as consideration, 340 n. 1.
 wrongful motive making actionable, 399 *et seq.*
- TORTIOUS.**
 feoffment, 180.
- TRADEMARK.**
 action for infringement of, survival of, 210 n. 2.
- TRESPASS.**
 in Anglo-Norman Law, 41.
 election between, and mayhem, 43 n. 2.
 jury in Curia Regis, 44.
- TRESPASS (continued).**
 origin of, 44.
 instead of appeal, 44, 48.
 defendant's fine, 45.
 count in, 45.
 compared with the appeal, 45.
 criminal prosecution a condition precedent to suit for, 45, 46.
 origin of, 44, 56, 179 n. 3.
 estray, 58.
 by servant, 58.
 by bailor at will, 58.
 by bailor for term, 58.
 by bailee against bailor, 59.
 relation to appeal of larceny, 60.
 for injury to or destruction of chattel, 60 n. 1.
 against second trespasser, 60-61.
 against finder, 82.
 concurrent with trover, 85-86.
 concurrent with replevin, 86, 183.
 personal action, 179.
 and replevin mutually exclusive, 181.
 by disseisor, 189, 190.
 trespasser acquired title, 195.
 judgment for plaintiff gives defendant title, 207-208.
 survival of, 210 n. 2.
 by tenant against stranger, 223 n. 10.
- TRESPASS AB INITIO.**
 origin of distinction taken in, 61-63.
 nonfeasance cannot create, 63.
 finder, 85-86.
- TRESPASS DE BONIS ASPORTATIS.**
 generally, 56-63.
 origin of, 56.
 similarity to appeal, 56.
 by heir of owner, 57.
 plaintiff's right in, 57.
 by owner against second trespasser, 57 n. 6.
 by bailor, 58.
 measure of damages, 59.
 none for wrongful distress, 64.
- TRESPASS QUARE CLAUSUM FREGIT.**
 no corresponding appeal for, 56 n.
 limits of, in old law, 183 n. 2.
 generally, 224-230.
 origin of, 224.
 plaintiff's right to bring, 225.
 by termor, 226.
 by freeholders, 226.
 by tenant at will or at sufferance, 227.
 possessory right sufficient for, 227, 228.
 actual possession necessary for, 228.
 by landlord, 228-229.
 constructive possession, 229.
 by disseisee, 229-230.
 by disseisee against disseisor, 230.
 legal process a defense in, 230.
- TREUHAND, 235, 237.**
- TRIAL BY BATTLE, 42, 48, 51, 53.**

TROVER.

- in general, 80-87.
- relation to detinue, 83-85.
- concurrent with trespass, 85-86.
- concurrent with detinue, 85-86.
- concurrent with replevin, 86.
- history of, compared with assumpsit, 87.
- as substitute for bill in equity, 87.
- by disseisor against disseisee, 178-179.
- origin of, 184.
- by disseisor, 190.
- judgment for plaintiff gives defendant title, 207-208.
- owner's rights against purchaser from converter, 208 and n. 1.
- survival of, 210 n. 2.

TRUST.

- enforcement against other than trustee, 75-76.
- right of *cestui que trust* compared with that of bailor, 76.
- analogy to account, 119.
- gratuitous declaration of, 125 n. 3.
- successive assignments by *cestui que trust*, 214.
- assignments by *cestui que trust*, 214 n. 3.
- relation of, to uses, 243-247.
- origin of, 243-247.
- created by use upon a use, 247 and n. 2.
- failure of charitable, 285.
- necessity of *cestui que trust* for, 286 *et seq.*
- oral, constructive trust on breach of, 425 *et seq.*

TRUST, CONSTRUCTIVE, 161, 445-446.

- liability of executor of debtor, 95.

See Constructive Trust.

TRUSTEE.

- who speculates, 446.
- factor as, 117.
- bona fides* as defense to purchaser from, 253.
- liability of, on contracts for benefit of estate, 460.

TYRREL'S CASE, 243-244, 247.**UNDISCLOSED PRINCIPAL.**

- fraud by agent of, to buy land, 264.
- rights and liabilities of, 453 *et seq.*

UNILATERAL CONTRACT.

- equity enforcing performance of, 377.

UNIVERSITIES OF ENGLAND.

- reason why lawyers not trained in, 357.

UNJUST ENRICHMENT.

- origin in common law, 162-164.
- debt, 163.
- as a basis for equity, 127-128, 234-235.

See Quasi-Contract.

USE.

- upon a use, 243-247.

USE AND OCCUPATION.

- assumpsit for, 165, 167-171.

USES.

- bargain and sale, 128.
- covenant to stand seised, 128.
- origin of, 233-242.
- in the ecclesiastical courts, 235-236.
- action of covenant by feoffor against feoffee, 236.
- feoffor's right of entry for condition broken, 236.
- by bargain and sale, 239.
- consideration of blood or marriage, 241-242.
- repugnancy, 244 and n. 5.

VALUE.

- purchase for, as defense, 253 *et seq.*

See Purchase.

VENDEE.

- fraudulent, a constructive trustee, 254.

VILLEIN.

- chose in action of, against disseisor, 188.

VOCATION.

- of law professor, 354 *et seq.*

VOLUNTEER.

- position of, 255 n. 1.

WADIA, 97-98.**WAGER CONTRACTS.**

- consideration in, 345.

WAGER OF LAW, 35-36, 41, 86 n. 7, 132, 150, 153, 168.**WAIF, 52.****WARRANTY.**

- extent of covenant of, 100.
- obligations of warrantors, 100-102.
- releases, 101.
- of goods as origin of assumpsit, 136-138.
- origin of, 136.
- breach of, a tort, 136.
- deceit in, 136.
- conception of, as a contract, 137.
- must be expressed, 137-138.
- assumpsit necessary in action for breach of, 149.
- of quality, 138.
- of title, 137-138.
- vouching to, 40, 51, 220.
- vouching to warranty in Salic Law, 40.
- vouching to, in appeal of robbery or larceny, 51.

WASTE, 135-136.**WAY.**

- of necessity, 199 n. 2.

WILL.

- repudiation of, prevented by fraud, 316.

WITENAGEMOTE, 35.**WORK AND LABOR.**

- indebitatus assumpsit for, 170.

WRIGHT.

- Court Hand Restored, 33.

WRIT.

- de parco fracto*, 64.
de proprietate probanda, 67, 69, 183.
ejectio firmæ, 222 n. 4, n. 7, 223, 224.
levari facias, 36 n. 1.
per quæ servitia, 210 n. 3.
præcipe quod reddat, 82 n. 1, 88.
quare ejecit infra terminum, 76 n. 3, 221,
 222, 223 and n. 10.
quibusdam certis de causis, 235 n. 1.
quid juris clamat, 210 n. 3.

WRIT (*continued*).

- quod permittat prosternere*, 231.
rescous, 64.

WRONGFUL MOTIVE.

See Motive.

YEAR BOOKS.

- description of, 30-31.
 citations from, see Table of Authorities.

